Supreme Court, U.S.
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No. 03-778

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In The
Supreme Court of the United States

THE ANTI-DEFAMATION LEAGUE AND SAUL ROSENTHAL,

Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the truth or falsity of speech relevant to whether the speech involves a matter of "public concern" under the First Amendment?

2. Are punitive damages authorized under the Federal Wiretap Act where a defendant relied in good faith upon the advice both of its own lawyers and of state prosecutors that its conduct did not violate the Act?

3. Are punitive damages authorized under the Federal Wiretap Act for defamatory use of illegally intercepted communications?

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

CORPORATE DISCLOSURE STATEMENT

The Anti-Defamation League is a nonprofit corporation organized under the laws of the District of Columbia; as such, it does not have a parent corporation and no publicly-held company owns 10 percent or more of the stock of the corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Anti-Defamation League ("ADL") and Saul Rosenthal (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F.3d 1044 (10th Cir. 2003), and is reprinted in the appendix hereto ("App.") at App. 1a-72a. The order of the court of appeals denying rehearing and rehearing *en banc* is reprinted at App. 180a. The opinion of the district court granting in part and denying in part summary judgment is reported at 43 F. Supp. 2d 1163 (D. Colo. 1999), and is reprinted at App. 73a-123a. An unreported post-trial order and memorandum decision of the district court is reprinted at App. 124a-179a.

JURISDICTION

The court of appeals entered judgment on April 22, 2003, and entered an order denying rehearing and rehearing *en banc* on August 25, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution and relevant provisions of the Federal Wiretap Act, 18 U.S.C. § 2510 *et seq.*, are reprinted at App. 182a-200a.

STATEMENT

This petition seeks review of a crippling $8.575 million award of punitive damages against a venerable and widely respected civil rights organization for the very type of speech that is critical to its mission. The award punishes Petitioners for public statements disclosing and

denouncing, in a civil complaint and in related press statements, what they in good faith believed was a concerted campaign of anti-Semitic harassment intended to drive a Jewish family, the Aronsons, from their recently purchased home in Respondents' neighborhood.[1] Petitioners' speech was based not only on the Aronsons' sworn allegations in their suit describing Respondents' pattern of harassing conduct, but on shocking excerpts of recorded telephone conversations in which Respondents discussed burning scarecrows and crosses on the Aronsons' property, throwing soap bars and lamp shades in their yard, taping an oven door to their house, and otherwise "taking some type of physical action toward the Aronsons or their home." App. 13a. Yet a divided panel of the Tenth Circuit concluded that Petitioners' speech was wholly unprotected by the First Amendment from punitive damages liability under state law defamation and Federal Wiretap Act claims because the speech did not touch on a matter of "public concern." *See* App. 25a-33a, 44a-46a, 55a.

The panel majority did not arrive at this counterintuitive conclusion as a matter of fact, which would not have been possible given the intense media and community interest in the case both before and after Petitioners' public statements. Rather, it found the speech lacking in "public concern" as a matter of law *because the speech was false*. In other words, the court below effectively applied a *per se* rule denying "public concern" status, and thus First Amendment protection, to false statements, which is precisely the kind of speech that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and similar "public concern" cases specifically protect from *punitive* damages awards absent a showing of "actual malice." This turns the First Amendment's actual malice test on its head. As the dissent

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[1] Petitioners do not challenge any aspect of the compensatory damage award in this Court.

below aptly put it: "If only true statements could be matters of public concern, ... public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action." App. 62a (Hartz, J., dissenting).

The panel majority's holding deepens and sharpens a split among the Circuits as to whether the truth or falsity of a statement is relevant, not to say dispositive, in assessing public concern status. The decision below is not only on the wrong side of the conflict, but has the potential to chill speech in a wide variety of cases. First Amendment protection often turns on whether the speech at issue touches on matters of public concern. A ruling from a court of appeals determining that only truthful speech may be deemed to relate to matters of public concern is, at one and the same time, inconsistent with rulings of this Court and threatening to core First Amendment principles.

The very nature of ADL's mission underscores the dire threat posed by the decision below. ADL was organized to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination, and to fight anti-Semitism, hatred, and bigotry. It does so in part by publicly exposing and denouncing haters and bigots, believing public exposure increases the chances both that individual attitudes will be changed and that people of good will and government authorities will be stirred to action. Thus, ADL's mission depends directly upon the protections afforded by the First Amendment to speech on core matters of public concern.

Quite apart from this critical First Amendment issue, this case presents certworthy issues concerning liability for punitive damages under the Federal Wiretap Act. When Petitioner ADL was initially approached by the Aronsons on October 22, 1994, it immediately – and correctly – determined, based upon consultations with lawyers and advice from the local district attorney's office, that the interception and recording by the Aronsons of

Respondents' cordless telephone conversations did not violate the Federal Wiretap Act. The Act was amended, unbeknownst to ADL and the local prosecutors, three days later to include cordless telephone communications within its prohibition. ADL's liability under the Wiretap Act was premised on its use, in the Aronsons' December 1994 verified complaint commencing this case, of excerpts of conversations unlawfully recorded after the Act's amendment. In affirming a $7.5 million punitive damages award (by far the largest ever awarded under the Act), the panel majority reasoned that punitive damages were available because ADL acted with reckless indifference to Respondents' rights under the Act by (1) failing to repeat its legal research before the filing of the complaint and (2) using "snippets" of the taped conversations "to falsely portray [Respondents] as anti-Semitic extremists." App. 51a-53a.

The dissenting judge below rightly "doubt[ed] that it would even be negligence, much less reckless indifference, not to recheck the law every few weeks." App. 67a. But even if it could be, a finding of reckless indifference was foreclosed as a matter of law because ADL had been assured by local prosecutors that the interception and recording of the conversations was lawful. That assurance was implicitly reaffirmed by the chief prosecutor himself who requested and regularly received copies of the recordings and used them in indicting Respondents two days after the filing of the Aronsons' complaint. *See* App. 12a-13a, 20a. The Eighth Circuit has held, in direct conflict with the Tenth Circuit in this case, that relying on the advice, albeit erroneous, of a law enforcement officer precludes a finding of recklessness necessary to support punitive damages under the Wiretap Act.

And as for the panel majority's concern that ADL falsely portrayed Respondents through snippets of their conversations, the Wiretap Act is designed to protect the privacy of communications, not the accuracy of their use by third parties. *See Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). The panel majority's ruling effectively recognizes a

federal damages action for defamation under the Wiretap Act, which Congress plainly did not intend to create. If this decision is allowed to stand, it will pave the way for unchecked and anomalous awards of punitive damages under the Act throughout the Tenth Circuit and possibly beyond.

A. Factual Background

In August 1994, a Jewish family, the Aronsons, moved into a house in Evergreen, Colorado (a suburb of Denver) that neighbored the home of Respondents William and Dorothy Quigley. Relations between the two families quickly deteriorated. Respondents complained of the Aronsons' supervision of the Quigley children while in their care, and twice reported the Aronsons' dog to animal control officials. The Aronsons severed ties with Respondents and, on a couple of occasions when Mrs. Aronson encountered Mrs. Quigley, Mrs. Aronson expressed strong resentment toward her using vulgar terms. *See* App. 3a-6a.

On October 20, 1994, the Aronsons began to intercept and record Respondents' cordless telephone conversations using a police scanner. That morning, Mr. Aronson recorded a conversation lasting approximately two hours between Mrs. Quigley and her friend, Ms. Ughetta. Toward the end of the conversation, Mrs. Quigley and Ms. Ughetta had the following exchange:

> Ughetta: And keep up the good work to isolate the Aronsons. I'll be praying for you. . . .
>
> Quigley: Well, if something big happens, you know, like there's a house burning or something, I'll call you.
>
> * * *
>
> Ughetta: So find out. Find out. That would be a good thing to do. Say, "Well, we figured that your roof was the best place to put this [burning

scarecrow]. So that the whole neighborhood could see it. I'm sorry that it burned down."

* * *

Quigley: (unintelligible) and we wanted, you know, we wanted everybody to see it. So we put it on the roof. Now, if I can't get a scarecrow, do you think I could douse a cross?

Ughetta: One of the kids. I think one of the kids would be fine. Yeah, a cross would be cool.

Quigley: A big cross and set that aflame?

Ughetta: Put a couple of hoods on top of it.

Quigley: Yeah, it's Halloween. We could just explain to the police, "You know, we're all dressed up. It's with our costume."

Ughetta: That's right. It'll have to be realistic to prove to people that we were pretending we were Ku Klux Klan members.

Quigley: Anti-Semitic? I don't think so, officer.

Ughetta: Right. That's like the Holocaust. Tape a big oven door on the side of their house.

Quigley: As if their front door is really an oven door. (unintelligible)

* * *

Ughetta: Throw a few ashes around the outside there.

Quigley: Yeah. We could throw some bars of soap and a lamp shade around the front, you know.

Ughetta: Oh, that is so (unintelligible)

Quigley: Sick, sick, sick. Oh, gosh.

App. 6a-8a.

Later on October 20, the Aronsons intercepted and recorded a conversation between Mr. and Mrs. Quigley in which he described an altercation he had had with Mrs. Aronson while driving his son to school that morning. Mr. Quigley reported that he had driven past Mrs. Aronson's

car at "'about 25 miles an hour,'" with the space between them "'very, very tight.'" App. 9a. Mr. Quigley said that he had "'thought about stopping,' 'pulling open the door [to Mrs. Aronson's vehicle] and throwing her on the ground.'" *Id.* (alteration in original).

Over the period between October 20 and November 1, 1994, the Aronsons overheard and recorded "approximately eight conversations in which Mrs. Quigley referred to the Aronsons' Jewish faith," in addition to "various conversations . . . in which [Mrs. Quigley] mentioned taking some type of physical action toward the Aronsons or their home," and a conversation between the Quigleys "in which Mr. Quigley referred to an 'old boys' network' in the film industry in which he worked, and complained about a colleague getting ahead because he was Jewish." App. 13a.

Meanwhile, on October 21, Mr. Aronson informed ADL's Denver office that Respondents were conducting an anti-Semitic campaign of intimidation against his family. ADL referred the Aronsons to Gary Lozow, a local attorney who was also a board member of the ADL's Denver office. Lozow met with the Aronsons on October 22, and immediately researched whether it was legal for the Aronsons to overhear and record Respondents' cordless telephone conversations. Lozow correctly determined that cordless telephone conversations were expressly excepted from the Federal Wiretap Act's prohibitions against interception and use. Lozow then contacted Mark Pautler, an assistant district attorney, and Dave Thomas, the district attorney, who both confirmed the legality of the recordings. Finally, Lozow called the Aronsons, relayed his conclusions, and advised them to contact the district attorney's office. *See* App. 12a & n.2; App. 127a.

Three days later, on October 25, 1994, Congress amended the Federal Wiretap Act, *inter alia*, to proscribe interception of the radio portion of a cordless telephone conversation, effective immediately. *See* Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290, 4291; 18 U.S.C. §§ 2510-11. Petitioners, Lozow, the Aronsons, and the district

attorney's office were all unaware of the amendment until December 1994.[2] Accordingly, the Aronsons continued to record the Quigleys' cordless telephone conversations and, at Pautler's request, to supply copies of the recordings periodically to the district attorney's office. Pautler indicated that he was using the recordings for purposes of an ongoing criminal investigation.

On November 5, the Aronsons met with Lozow and one of his associates, with an ADL employee, and with Stuart Kritzer, another attorney who sat on the ADL's local board of directors. The group discussed various courses of action, including filing a civil complaint against Respondents, and agreed that the Aronsons should continue making recordings. *See* App. 13a. Thereafter, Kritzer drafted a civil complaint for the Aronsons against Respondents; certain allegations in the complaint quoted excerpts of various conversations intercepted and recorded between October 20 and November 4. On December 6, attorneys Lozow and Kritzer filed the Aronsons' complaint against Respondents in federal court, asserting claims for, *inter alia*, conspiracy to interfere with civil and property rights in violation of federal law, and ethnic intimidation in violation of state law. Later that same day, Petitioner Rosenthal, the executive director of ADL's Denver office, received a request from the DENVER POST to comment on the lawsuit. *See* App. 14a-16a, 127a.

On December 7, both the DENVER POST and the ROCKY MOUNTAIN NEWS published stories about the Aronsons' federal lawsuit, and Petitioner Rosenthal held a press conference. *See* App. 15a-16a; *id.* at 63a (Hartz, J., dissenting). Rosenthal had neither listened to the recordings of Respondents' conversations nor reviewed a transcript of

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[2] Upon learning in December of the amendment, Lozow took corrective action to ensure against any prospective use of the illegal interceptions. *See* App. 21a.

them, but he relied upon the allegations in the Aronsons' complaint and consulted attorney Kritzer in preparing his remarks. In his statement opening the press conference, Rosenthal said that the Aronsons had "'bec[o]me the targets of a vicious anti-Semitic campaign'" by Respondents, that made for "'one of the most astonishing cases of anti-Semitic harassment our office has ever confronted'"; and he cast various statements made by Respondents, as quoted in the Aronsons' complaint, in that light. App. 15a-17a. In a radio interview that same day, Rosenthal similarly condemned Respondents for leading a contemptible anti-Semitic campaign of intimidation and harassment against the Aronsons. *See* App. 17a-20a.

On December 9, district attorney Thomas filed a state law criminal complaint against Respondents, charging them with ethnic intimidation and conspiracy to commit ethnic intimidation, and charging Mr. Quigley with felony menacing (*i.e.*, using his vehicle to threaten injury upon Mrs. Aronson).[3] As noted, the Aronsons had provided the prosecutors with copies of the intercepted telephone recordings, and the prosecutors used them to investigate and bring the criminal charges. *See* App. 12a-13a, 20a, 127a.

As a result of the Aronsons' civil suit, the attendant publicity (including that generated by Petitioners' press conference and radio appearance), and the criminal complaint, Respondents suffered immediate personal repercussions. *See* App. 20a-21a.

In January 1995, Respondents answered the Aronsons' complaint by asserting counterclaims against the Aronsons and Petitioners for defamation and invasion of privacy. They also filed a separate federal suit – thereafter

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[3] The state prosecutor's office ultimately found sufficient basis to prosecute Mr. Quigley only for felony menacing and therefore dismissed the other charges. *See* App. 22a.

consolidated with the Aronsons' suit – against Petitioners for violating the Federal Wiretap Act. Respondents contended that using illegal recordings of Respondents' conversations in the Aronsons' complaint violated the Wiretap Act and that ADL was responsible because lawyers Lozow and Kritzer had acted as ADL's agents. *See* App. 21a-22a.[4] The Aronsons later sued Lozow and Kritzer in Colorado state court, alleging breach of fiduciary duty. On February 20, 1998, Lozow, Kritzer, the Aronsons, and Respondents reached a settlement whereby Lozow and Kritzer agreed to pay the Quigleys $175,000 each and the Aronsons $25,000, and those parties released each other from liability for all federal and state claims. Respondents thus proceeded to a jury trial solely against Petitioners. *See* App. 23a.

B. District Court

Following trial, the jury returned a special verdict in favor of Respondents and against both Petitioners for defamation based on Rosenthal's comments at the press conference and on the radio show, and against ADL for violation of the Federal Wiretap Act, 18 U.S.C. § 2511(1)(d), based on the lawyers' use of Respondents' conversations in the Aronsons' civil complaint.[5] The jury awarded Mr. Quigley $900,000 in economic damages, $100,000 in noneconomic damages, $750,000 in punitive damages on the state law defamation claim, and $5 million in punitive damages on the Federal Wiretap Act claim; it

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[4] Respondents also sued the district attorney, who settled in the fall of 1995 and published letters of apology. *See* App. 23a.

[5] The jury rejected Respondents' claim that ADL had "procured" the interceptions in violation of the Federal Wiretap Act. *See* App. 45a. The jury also found for Respondents on two invasion of privacy claims, but those findings were reversed on appeal on state law grounds. Accordingly, the court of appeals upheld the award of damages under state law solely on the basis of the defamation claims. *See* App. 56a-60a.

awarded Mrs. Quigley $500,000 in noneconomic damages, $750,000 in punitive damages on the state law defamation claim, and $2.5 million in punitive damages on the Federal Wiretap Act claim. *See* App. 23a-24a.[6]

Prior to trial, in response to Petitioners' motion for summary judgment, the district court rejected the contention that Rosenthal's December 7 statements involved matters of "public concern." Accordingly, the court determined that Respondents were not obliged to prove actual malice in order to prevail on their defamation claims under Colorado law. *See* App. 91a-95a, 101a-103a. The court reaffirmed this ruling in rejecting Petitioners' post-trial argument that the defamation verdict could not stand because "plaintiffs did not carry their burden to prove by clear and convincing evidence that Rosenthal and the ADL acted with 'actual malice.'" App. 136a.[7]

With respect to the Federal Wiretap Act claim, the district court rejected Petitioners' argument that "Lozow and Kritzer's good faith belief that it was legal to intercept cordless telephone calls precludes the award of punitive damages." App. 140a. The court moreover justified the award of punitive damages against ADL on a defamation theory, reasoning that, although Lozow and Kritzer

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[6] The trial court modified the jury's award in only two respects. First, the court reduced Respondents' compensatory damages by $175,000 each to account for their prior recovery from Lozow and Kritzer. *See* App. 24a. Second, it remitted Mrs. Quigley's state law punitive damages from $750,000 to $325,000, the amount of her compensatory damages (as reduced to avoid double recovery) so as to comply with the governing Colorado statute. *See* App. 24a.

[7] The district court instructed the jury that it had to find actual malice in order to find for Respondents on their false light invasion of privacy claims, and the court found sufficient evidence to support such a finding on those separate claims. *See* App. 136a-138a. As noted above, however, those verdicts were reversed by the Tenth Circuit on state law grounds. *See supra* at 10 n.5.

(deemed to be ADL's agents) "believed that the interception of cordless telephone calls was lawful based upon [legal] research as well as the representations of [prosecutors] Pautler and Thomas," they had "selected only isolated snippets of the hours of illegally taped conversations to frame the Aronsons' complaint" so as to inaccurately depict Respondents as anti-Semites. App. 141a.

C. Court Of Appeals

1. A divided panel of the Tenth Circuit upheld the award against Petitioners, as modified by the district court, in its entirety. The majority squarely rejected Petitioners' arguments that the First Amendment protected them against the punitive damages awarded on the state law defamation and Federal Wiretap Act claims. The panel specifically held that the speech giving rise to the defamation verdicts (*i.e.*, Rosenthal's statements at the press conference and on the radio show) was not entitled to the protection of the "actual malice" standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the court ruled that Rosenthal's statements to the press did not touch on a matter of "public concern," even though they involved a civil suit alleging a concerted campaign of ethnic and religious discrimination, including harassment and threats of violence, and even though the district attorney believed that those allegations sufficiently affected the public interest to warrant indictment. *See* App. 26a-33a.[8] While the panel acknowledged this

[8] Although the Tenth Circuit addressed the "public concern" question in light of Colorado law in considering liability, *see* App. 25a-31a, its affirmance of the punitive damages award was necessarily predicated upon the conclusion that the speech did not involve a matter of public concern for purposes of the First Amendment. *See Gertz*, 418 U.S. at 349 (punitive damages not available where speech involves an issue of public concern absent a showing of actual malice). As noted in

(Continued on following page)

Court's holding that speech concerning claims of racial discrimination is "'a matter inherently of public concern,'" App. 31a (quoting *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983)), it nonetheless rejected "the conclusion that the allegations [of anti-Semitic harassment] in the Aronsons' lawsuit were a matter of public concern," primarily because Petitioners "knew or should have known" that the Aronsons' claims were "baseless" and "not colorable." App. 31a-33a. The panel majority therefore found it unnecessary to address Petitioners' "argument that the Quigleys failed to produce clear and convincing evidence of 'actual malice' on the part of defendants in making the alleged defamatory statements." App. 33a & n.7.

The majority echoed this reasoning in rejecting Petitioners' arguments against any damages (not just punitive damages) awarded under the Federal Wiretap Act, 18 U.S.C. § 2511(1)(d). The majority first held that the First Amendment does not bar liability under the Act notwithstanding this Court's ruling in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The panel distinguished *Bartnicki*, "[f]irst, and most importantly," on the basis of its conclusion that, unlike the conversation at issue there, "the contents of the Quigleys' intercepted telephone conversations were not matters of public concern." App. 44a. Reiterating its own factual determination that "there is no credible basis for concluding . . . that the Quigleys were engaged in an anti-Semitic campaign to . . . force [the Aronsons] out of the neighborhood," the panel majority faulted ADL for having (through the actions of its agents, lawyers Lozow and Kritzer) "merely used snippets of the Quigleys' conversations in preparing the Aronsons' civil complaint" so as to "inaccurately portray[] those comments

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the text, the court, precisely because it had concluded that the speech did not involve a matter of public concern, refused to consider Petitioners' argument that the actual malice standard had not been satisfied. *See* App. 33a & n.7.

as demonstrating the existence of an anti-Semitic campaign on the part of the Quigleys against the Aronsons." App. 44a-45a.

The panel majority returned to this theme yet again to reject Petitioner ADL's argument that the *punitive* damage award on the Federal Wiretap Act claim violated the First Amendment. ADL argued that if the Act permits an award of punitive damages to be premised on the allegedly defamatory nature of the "use" of the intercepted calls, this Court's holding in *Gertz* nonetheless forbids the imposition of punitive damages "'for the false content of speech on a matter of public concern'" in the absence of a finding of "'both falsity and actual malice under the "clear and convincing" evidence standard.'" App. 55a (quoting C.A. Brief of Petitioners at 54). The panel rejected this argument – not because it disagreed with Petitioners' submission that the rule of *Gertz* governs punitive damage awards premised upon the defamatory impact of a violation of the Federal Wiretap Act, but rather because "the contents of the recorded telephone conversations were purely private matters, rather than matters of public concern, and because the contents of those conversations were not accurately reported by [Petitioners]." App. 55a.[9]

2. In upholding the $7.5 million in punitive damages awarded against Petitioner ADL under the Federal Wiretap Act, the majority flatly rejected ADL's argument that

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[9] The panel majority suggested that it was "unclear from the record whether this argument was ever raised in the district court." App. 55a. But it was the district court's post-trial decision that had first raised the issue by using a defamation theory to justify the jury's award. *See* App. 140a-141a. In any event, the panel "assum[ed]" that the argument had been raised in the district court and proceeded to resolve it on the merits. *See* App. 55a. Accordingly, the issue is fully preserved for this Court's review. *See Virginia Bankshares. v. Sandberg*, 501 U.S. 1083, 1098-99 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented.") (citation omitted); *Stevens v. Department of the Treasury*, 500 U.S. 1, 9 (1991).

such damages were not available under the statute where, as here, the relevant actors immediately and diligently researched the legality of the intercepts and thereafter obtained corroborating assurances from the district attorney's office. The majority reasoned that Petitioner's lawyers should once more have researched the legality of using the intercepts before filing the Aronsons' complaint on December 6. *See* App. 51a-52a. And the court again emphasized the falsity of Petitioner's speech: "[T]he evidence suggests that Lozow and Kritzer used . . . snippets of conversation to falsely portray the Quigleys as anti-Semitic extremists willing to use aggressive and violent tactics to drive the Aronsons from the neighborhood." App. 53a.

3. Judge Hartz dissented from the panel's decision to affirm the punitive damage awards. He reasoned that the majority fundamentally erred in determining that Petitioners' speech did not involve a matter of public concern simply because it was false. "[I]n determining whether allegedly defamatory statements are matters of public concern, a court must assume the statements to be true. If only true statements could be matters of public concern, [the] public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation . . . action." App. 62a. Analyzed correctly, the statements in question did indeed involve a matter of public concern: after all, "*the* social concern of our day is bigotry," two major news outlets had run stories about the Aronsons' allegations in advance of Petitioners' public statements, and even Respondents "accept[ed] the characterization of faith-based bigotry as a matter of public concern." App. 63a.

Judge Hartz also rejected the majority's holding that Congress intended the Federal Wiretap Act to "authorize punitive damages for . . . malicious violation of some state-law right [*i.e.*, that associated with defamation laws] not otherwise protected by the act." App. 66a. Instead, he would have looked only to whether "ADL knew or showed

reckless disregard for the matter of whether its conduct was prohibited by the [Federal Wiretap Act]." App. 66a (internal quotations and citation omitted) (alteration in original). And Judge Hartz doubted "it would even be negligence, much less reckless indifference, not to recheck the [Act] every few weeks." App. 67a.[10]

4. Following issuance of the panel's decision, Petitioners timely sought rehearing by the panel and rehearing *en banc*. After requesting a response from Respondents, the court of appeals denied the petitions on August 25, 2003.[11]

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S HOLDING THAT PETITIONERS' SPEECH DID NOT INVOLVE A MATTER OF PUBLIC CONCERN BECAUSE IT WAS FALSE DEEPENS A RECURRING CONFLICT AMONG THE CIRCUITS AND CONTRAVENES THIS COURT'S PRECEDENTS.

1. The speech at issue in this case asserted that Respondents were engaged in a concerted anti-Semitic

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[10] Although Judge Hartz suggested that ADL had not explicitly preserved its "good faith defense," *see* App. 69a, the majority found the issue preserved and reached it on the merits such that it is properly before this Court. *See Sandberg*, 501 U.S. at 1098-99 n.8 ("It suffices for our purposes that the court below passed on the issue presented.") (citation omitted); *Stevens*, 500 U.S. at 9. Moreover, Judge Hartz's concern was based entirely on his misconception that ADL failed to renew its motion for a directed verdict at the close of all the evidence. In fact, Respondents *expressly stipulated*, with the district court's approval, that ADL need not make an additional motion. *See* App. 207a; *see also* App. 202a-205a.

[11] Petitioners moved to stay the mandate pending certiorari review; the court of appeals denied the motion on September 19, 2003. Petitioners also sought a stay of execution of the judgment pending certiorari review; Justice Breyer denied that application on September 24, 2003.

campaign of harassment and intimidation designed to drive a newly arrived Jewish family from their home in Respondents' suburban Denver neighborhood. This speech took two forms: allegations in the Aronsons' civil complaint, which excerpted portions of Respondents' recorded telephone conversations, and Petitioners' statements to the press about the lawsuit's allegations.

In affirming punitive damages awards totaling $8.575 million, the Tenth Circuit majority held that Petitioners' speech was not entitled to any First Amendment protection whatever. With respect to the portion of the award ($1.075 million) attributable to Respondents' state law defamation claim, the panel majority acknowledged this Court's decision in *Gertz*, holding that speech touching on a matter of "public concern" cannot be sanctioned with punitive damages absent a finding of "actual malice." *See* 418 U.S. at 349. Nevertheless, no actual malice finding was necessary under the panel's reasoning because it held that Petitioners' press statements did not, as a matter of law, "involve[] matters of 'public concern.'" App. 26a-33a. Likewise, the majority affirmed the jury's $7.5 million punitive damages award under the Federal Wiretap Act on a defamation theory – *i.e.*, that ADL "used the snippets of [intercepted] conversation[s] [in the Aronsons' complaint] to falsely portray the Quigleys as anti-Semitic extremists," App. 52a, but reiterated that "the First Amendment provides no refuge for the ADL in this case, . . . [because] the recorded telephone conversations were purely private matters, rather than matters of public concern." App. 55a. Accordingly, the majority upheld both punitive damages awards under Colorado's simple negligence standard for defamatory speech on matters that are "not . . . of 'public or general concern.'" App. 26a n.4; *see also* App. 33a n.7.

The panel majority correctly acknowledged, using words borrowed from this Court's decision in *Connick v. Myers*, 461 U.S. 138, 146 (1983), that "'speech touches a matter of public concern [when] . . . it can be fairly considered as relating to any matter of political, social, or other

concern to the community.'" App. 29a (citation omitted). Yet, the majority found Petitioners' speech lacking in "public concern" despite the intense media and community interest attracted by the Aronsons' lawsuit and notwithstanding Respondents' *concession* that a "'conspiratorial plan to harm persons of a particular religious faith and drive them from the neighborhood . . . is a matter of public concern.'" App. 63a (Hartz, J., dissenting) (quoting C.A. Answering Brief of Respondents at 30).

According to the majority, the public concern inquiry turns on the *truthfulness* of the speech at issue. ADL's speech did not "relat[e] to any matter of . . . social . . . concern to the community" because ADL "should have known[] that the allegations in the Aronsons' lawsuit were baseless" and "not colorable." App. 29a, 32a-33a; *see* App. 44a (speech lacked public concern because "there is no credible basis for concluding, as suggested by the defendants, that the Quigleys were engaged in an anti-Semitic campaign to harass the Aronsons . . . out of the neighborhood"); App. 55a (same).[12] In effect, the panel majority applied a *per se* rule denying public concern status, and thus First Amendment protection, to negligently false speech.

2. "The Circuits appear to be split on whether, in light of *Connick*, recklessly false statements are *per se* unprotected" by the First Amendment. *Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir. 1995). In identifying this Circuit split, the Ninth Circuit pointed to an earlier Tenth Circuit case observing: "'[T]he truth or falsity of the statements at issue is relevant to . . . the threshold public concern analysis. . . . It is difficult to see

[12] Punishing Petitioners for what they "should have known" "amount[s] to a negligence standard," *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999), satisfaction of which "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *New York Times Co.*, 376 U.S. at 288.

how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern.'" *Id.* (quoting *Wulf v. City of Wichita*, 883 F.2d 842, 859 n.24 (10th Cir. 1989)). In *Johnson*, the Ninth Circuit expressly disagreed, rejecting a public employer's argument that statements for which the plaintiff-employee was fired "were not upon matters of public concern because they were false and made with reckless disregard for the truth." *Id.* at 422. Relying on this Court's decisions in both *Gertz* and *New York Times Co. v. Sullivan*, the Ninth Circuit carefully distinguished the threshold inquiry into whether the speech related to matters of public concern from the subsequent inquiry into the truth or falsity of that speech, concluding that the latter inquiry is irrelevant to the former. *See* 48 F.3d at 422-24.

At least four other Circuits have spoken to the issue, all squarely rejecting the argument that "speech ... cannot address matters of public concern absent proof of the truthfulness of [that] speech." *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 577 (6th Cir. 1997). The court in *Chappel* held that "[a] public employee is not required to prove the truth of his speech in order to secure the protections of the First Amendment" accorded to speech regarding an issue of public concern. *Id.* at 576. Unlike the Ninth Circuit, however, the Sixth Circuit did suggest that First Amendment public concern "protection may not be available when a public employee knowingly or recklessly makes false statements." *Id.*

The Fifth Circuit too has squarely rejected the argument that only "completely accurate" speech can "involve a matter of public concern." *Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998). The court held that "the accuracy of the speech ... [does not] play[] a role in determining whether the expression involves a matter of public concern." *Id.*; *see also Victor v. McElveen*, 150 F.3d 451, 456-57 (5th Cir. 1998) (same).

And in *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985), the First Circuit reversed a district court's holding that,

"even if [the relevant] statements were merely negligently false, they were not constitutionally protected" as speech relating to a matter of public concern. *Id.* at 834. The First Circuit concluded that false statements negligently made are protected by the First Amendment under the public concern doctrine. *Id.* at 844. Citing this Court's decision in *Gertz*, the First Circuit held that "the mere fact that the statements were erroneous does not remove them from the Constitution's protection. . . . To deny protection to false statements negligently made would chill discourse altogether." *Id.*

Finally, the decision below conflicts directly with the analysis and conclusion of the Second Circuit in a closely analogous defamation case involving efforts by a public interest group to combat discrimination. The Second Circuit ignored the alleged falsity of the statements in question in concluding that they involved an issue of public concern:

> Gender discrimination is a problem of constitutional dimension, and the efforts of the [defendant American Association of University Women ("AAUW")] to combat it clearly relate to a matter of public concern. The purported allegation that [plaintiff], an attorney specializing in the field, engages in unethical solicitation of victims of gender discrimination is also a matter of public concern, especially when brought to the public's attention by way of a publication with the imprimatur of the AAUW.

Flamm v. American Ass'n of Univ. Women, 201 F.3d 144, 150 (2d Cir. 2000) (remanding for determination whether AAUW acted with actual malice).[13]

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[13] Decisions of state appellate courts also reflect division, or at least confusion, on this issue. *Compare Turner v. Devlin*, 174 Ariz. 201, 205 (1993); *with Cox v. Civil Serv. Comm'n*, 259 Neb. 1013, 1027-28 (2000); *with Robson v. Klamath County Bd. of Health*, 109 Or. App. 242, 245-47

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The Tenth Circuit, we respectfully submit, was on the wrong side of this Circuit split even before its decision in this case. The decision below, however, not only sharpens that split, it compounds the Tenth Circuit's preexisting error by extending its *per se* rule beyond recklessly false speech to include *negligently* false speech. In so doing, the decision below effectively nullifies the public concern doctrine. For under the panel majority's reasoning, only true speech, or false speech that is not negligent, can touch on a matter of public concern. But speech that satisfies either criterion can never give rise to *any* defamation liability, so the very notion of specially protecting speech touching a matter of public concern from punitive damages is effectively nullified by the ruling below. In other words, by adopting a *per se* rule denying public concern status to negligently false statements, the decision below perversely excludes from First Amendment protection the precise, and the only, kind of speech that the "actual malice" standard of *Gertz* was designed to protect from punitive damage awards. As Judge Hartz aptly observed in dissent, "[i]f only true statements could be matters of public concern, [the] public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action." App. 62a (Hartz, J., dissenting). Or, as this Court put it in *Gertz*, " '[i]t would undermine the rule of [*New York Times Co. v. Sullivan*] to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the

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(1991), *id.* at 250-51 (Warren, P.J., concurring); *Grievance Adm'r v. Fieger*, ___ Mich. ___, SC: 122564, 2003 Mich. LEXIS 2283, at *5 (Mich. Oct. 30, 2003) (Corrigan, C.J., dissenting from denial of review). The upshot is that "the concept of speech addressing matters of public concern has proved . . . murky," a problem that "could be relieved by clarification from the Supreme Court." Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting A Problematic Defamation Category*, 65 MO. L. REV. 597, 609 (2000).

benefit of the rule.'" 418 U.S. at 331 n.4 (approvingly quoting lower court).

As the facts of this case illustrate, the critical distinction between the threshold inquiry into whether particular speech involves a matter of public concern and the subsequent inquiry, conducted under the actual malice standard, into the speech's falsity and the fault attributable to the speaker, is no mere technical nicety but a vital corollary of the First Amendment itself. The statements made by Respondents, on their face, spoke of plans to burn a cross and to place symbols evocative of the Holocaust (an oven door, bars of soap, a lamp shade) in the Aronsons' yard. *See* App. 6a-8a; *see also* App. 9a, 13a. Petitioners interpreted those literal statements, combined with the conduct described by the Aronsons, as evidence of an anti-Semitic and potentially violent campaign to harass the Aronsons from their neighborhood. That such a campaign is in fact a "matter of . . . social . . . concern to the community" has never been questioned in this case, even by Respondents. Indeed, as Judge Hartz noted in dissent, "*the* social concern of our day is bigotry." App. 63a.

The panel majority, however, concluded that Petitioners' interpretation was wrong – that "the . . . allegations of racial discrimination/harassment were not colorable," App. 33a – and for that reason held that ADL's speech was unprotected by the First Amendment from punitive damages liability. But the very premise of the "actual malice" standard is that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co.*, 376 U.S. at 271-72 (citation omitted). Indeed, in *New York Times Co. v. Sullivan*, this Court observed that the speech at issue there "would seem . . . to qualify for constitutional protection" because of its public importance, and the Court framed the question as whether "it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent." *Id.* at 271. The Tenth

Circuit's decision in this case thus presents nothing less than the question whether this Court's landmark holding in *New York Times Co. v. Sullivan*, that even false speech on an issue of public concern is entitled to the heightened protection afforded by the actual malice standard, may be circumvented by a rule providing that speech will not be deemed to involve a matter of public concern when it is false. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2565 (2003) (Breyer, J., dissenting) ("[I]n other contexts the Court has held that speech on matters of public concern needs 'breathing space' – potentially incorporating certain false or misleading speech – in order to survive.") (citing *New York Times Co.*, 376 U.S. at 272; *Gertz*, 418 U.S. at 340; *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967)).

The need for such interpretive "breathing space" is vividly illustrated by the Court's own examination last Term of the question whether the act of burning a cross, without more, presumptively constituted racially discriminatory intimidation. *Compare Virginia v. Black*, 123 S. Ct. 1536, 1550-51 (2003) (plurality opinion) (invalidating under First Amendment a state law that "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself") *with id.* at 1567 (Thomas, J., dissenting) (presumption that burning a cross constitutes intimidation is constitutional because "not making a connection between cross burning and intimidation would be irrational"). Whatever may be said about government's ability to imprison a cross-burner absent any evidence of scienter beyond the bare fact that a cross was burned, surely a newspaper editorial denouncing the cross-burning as racist based on the same evidence enjoys full First Amendment protection against *punitive* damages even if it turned out that the cross was burned, say, by an actor as part of a movie production. In other words, unless it could be shown that the editorial writer *knew* or acted with *reckless disregard* of the truth, punitive damages could not lie. Petitioners had the right to express the like view in this case. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991) (speech

that "was not an assessment of events that speak for themselves, but one of a number of possible rational interpretations of an event that bristled with ambiguities and descriptive challenges for the writer represented the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies") (internal quotations and citations omitted).

3. The decision below has speech-chilling implications that sweep far beyond the law of defamation, for First Amendment protection turns on the "public concern" inquiry in a wide variety of recurring contexts. For example, in *Bartnicki*, 532 U.S. at 534, this Court held that the First Amendment immunizes from *any* liability under the Federal Wiretap Act, not just punitive damages liability, a defendant who lawfully obtained and published illegally intercepted private communications relating to "matters of public importance." The Court has also held that speech by governmental employees enjoys heightened First Amendment protection when it involves issues of public concern. *Connick v. Myers*, 461 U.S. 138, 145-46 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 571-72 (1968). And in the commercial speech context, the Court granted (but later dismissed) certiorari last Term to consider the California Supreme Court's holding that "the First Amendment does not protect Nike's statements insofar as they were false or misleading – regardless of whatever role they played in public debate." *Nike*, 123 S. Ct. at 2560 (Breyer, J., dissenting from dismissal of certiorari) (citation omitted).[14]

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[14] *See also United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995) (ban on receipt of honoraria by federal employees must fall where "expressive activities . . . fall within the protected category of citizen comment on matters of *public concern* rather than employee comment on matters related to personal status in the workplace") (emphasis added); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (prohibition against disclosure of grand jury testimony unconstitutional where "a person [has] lawfully obtain[ed] truthful

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The First Amendment inquiry into whether particular speech does or does not involve a matter of public concern is the same in all of these contexts. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion). This Court should review the Tenth Circuit's ruling on this pivotal issue, and should make clear that the alleged falsity of speech is irrelevant to the question whether it touches on a matter of public concern. *See Rankin v. McPherson*, 483 U.S. 378, 387 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.").

II. THE RULING BELOW CONFLICTS WITH THE EIGHTH CIRCUIT'S HOLDING THAT PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE FEDERAL WIRETAP ACT WHERE A DEFENDANT RELIES IN GOOD FAITH UPON THE ADVICE OF LAW ENFORCEMENT THAT ITS CONDUCT IS LEGAL.

After the Aronsons met with Lozow on October 22, 1994, Lozow immediately and diligently researched the legality of the Aronsons' intercepts and concluded, correctly at the time, that cordless telephone conversations were expressly excepted from the Federal Wiretap Act's prohibition against interception and use. *See* App. 12a. Lozow also consulted with assistant district attorney Pautler and district attorney Thomas, both of whom agreed that the interceptions were legal. *See* App. 12a &

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information about a matter of *public significance*") (internal quotation and citation omitted) (emphasis added); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (invalidating application of statute that would ban disclosure of operations of judicial review commission, because "operations of the courts and the judicial conduct of judges are matters of utmost *public concern*") (emphasis added).

n.2; App. 127a. The prosecutors implicitly reaffirmed these assurances throughout November and early December by requesting and accepting copies of the recordings and using them in the investigation and criminal prosecution of Respondents. And immediately upon discovering, two weeks after filing the Aronsons' complaint, that some of the recordings excerpted in the complaint had been proscribed by the October 25 amendment to the Federal Wiretap Act, Lozow deleted the offending excerpts from the complaint. *See* App. 21a. The panel majority nonetheless concluded that ADL was properly subjected to $7.5 million in *punitive damages* under the Act – far and away the largest such award ever imposed[15] – because it did not update its legal research and therefore did not discover the October 25 amendment to the Wiretap Act until mid-December. *See* App. 51a-52a & n.15.

The facts of this case make clear that ADL and the lawyers deemed its agents were acutely concerned about the legality of the Aronsons' interceptions, and they took great pains to insure that their use of the intercepted conversations did not violate any law, including the Federal Wiretap Act. That the lawyers did not recheck their legal research before filing the Aronsons' complaint cannot on this record plausibly be deemed to constitute reckless indifference to the requirements of the Act.[16]

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[15] The largest award of punitive damages under the Federal Wiretap Act that our research has uncovered was for $140,000. *See Heggy v. Heggy*, 944 F.2d 1537, 1538 (10th Cir. 1991).

[16] *See Citron v. Citron*, 722 F.2d 14, 15-17 (2d Cir. 1983) (holding that liability, as well as punitive damages, under prior version of the Act hinged upon showing of "willful" violation). *See also Shaver v. Shaver*, 799 F. Supp. 576, 580 (E.D.N.C. 1992) ("plaintiff is not entitled to punitive damages" under the Federal Wiretap Act where "record demonstrates that the defendant mistakenly believed that her actions

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Indeed, the dissenting member of the panel expressed "doubt that it would even be negligence, much less reckless indifference, not to recheck the law every few weeks." App. 67a.

In any event, quite apart from ADL's (or the lawyers') diligence in immediately researching the law, a finding of reckless indifference is foreclosed in this case as a matter of law because ADL relied throughout the relevant period on the local prosecutors' continuing assurances, both express and implied, that the Aronsons' interceptions were legal. The panel majority's contrary ruling conflicts with *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992). There, the Eighth Circuit squarely held that where a defendant "inquired of a law enforcement officer and was told that the officer saw nothing wrong with [the defendant] tapping his own phone," the resulting "taping was neither wanton nor reckless" so as to permit an award of punitive damages under the Wiretap Act. *Id.* at 1159. The conflict on this point between the Eighth and Tenth Circuits is clear, and so is the correctness of the view of the Eighth Circuit.

III. PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE FEDERAL WIRETAP ACT FOR DEFAMATORY USE OF INTERCEPTED COMMUNICATIONS.

In holding that punitive damages were justified under the Federal Wiretap Act because Petitioner ADL "used the snippets of conversation[s] to falsely portray the Quigleys

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were lawful"); *Campiti v. Walonis*, 467 F. Supp. 464, 466 (D. Mass. 1979) ("because defendants [mistakenly] believed in the propriety of their actions[,] the maliciousness or wantonness required for the imposition of punitive damages [under the Act] is not present").

as anti-Semitic extremists," App. 52a, the panel majority effectively created a federal damages action for defamation – the first in the Nation's history – that Congress plainly did not intend to authorize.

The Federal Wiretap Act is utterly indifferent to whether an illegally recorded conversation is ultimately used accurately or deceptively – the Act is designed to protect the *privacy* of communications, not the accuracy of their use by third parties. As this Court stressed in *Bartnicki*: "The statute *does not distinguish* based on the content of the intercepted conversations, *nor is it justified* by reference to the content of those conversations." 532 U.S. at 526 (emphases added). Rather, "the basic purpose of the statute at issue is to 'protect the privacy of wire[, electronic,] and oral communications.'" *Id.* (quoting legislative history) (alteration in original). If anything, the Wiretap Act is more deeply offended by *accurate* and *exhaustive* publication of private conversations protected by the statute. The dissent below therefore is surely correct that Congress did not intend the Act to provide a federal damages action (including punitive damages) for defamation. App. 65a-66a (Hartz, J., dissenting).[17]

[17] Although the Sixth Circuit has pointed to the culpability of a party's "attempt[] to damage . . . reputations" as a basis for punitive damages under the Wiretap Act, it did so only where the party was specifically "on notice that disclosure . . . was illegal." *Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001). The Tenth Circuit therefore stands by itself in sanctioning an award of punitive damages under the Act solely on defamation grounds, notwithstanding a defendant's undisputed good faith with respect to its violation of the Act.

Indeed, if the punitive damages provision of the Wiretap Act can be read to support an award for defamatory use of illegally intercepted speech, it presumably can be read to create a duplicative federal damages remedy for any other unlawful or tortious misuse of intercepted communications. For example, upholding punitive damages under the Wiretap Act on defamation grounds is not materially different from penalizing a defendant under the Act for, say, insider trading, blackmail, or any other misuse of unlawfully intercepted communications.

Finally, importing a defamation theory into the Wiretap Act's punitive damages provision not only would create a previously unknown federal cause of action, but would also supplant state law limiting the size of punitive damages awards. The disparity in this case between the $1.075 million in punitive damages awarded under state defamation law, as compared to the *$7.5 million* in punitive damages awarded under federal law, is attributable to Colorado Rev. Stat. Ann. § 13-21-102, which specifically caps state law punitive damages at the amount of compensatory damages. *See* App. 64a n.1 (Hartz, J., dissenting). Because providing a federal remedy for a "cause of action . . . traditionally relegated to state law" thus would threaten to "override[]" "established state policies," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478-79 (1977) (internal quotation and citation omitted), it is especially inappropriate to read a defamation cause of action into the Wiretap Act, as the Tenth Circuit has done.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 24, 2003

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No. 01-1228

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

327 F.3d 1044; 2003 U.S. App. LEXIS 7606

April 22, 2003, Filed

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JUDGES: Before BRISCOE, BALDOCK, and HARTZ, Circuit Judges. HARTZ, Circuit Judge, concurring in part and dissenting in part.

OPINION BY: BRISCOE

OPINION: **BRISCOE**, Circuit Judge.

Defendants Saul Rosenthal and the Anti-Defamation League appeal the district court's entry of judgment, following a jury trial, on plaintiffs' claims against them

under the federal wiretap act[1] for using intercepted cordless telephone conversations, and under Colorado state law for defamation, invasion of privacy by intrusion, and false light invasion of privacy. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, reverse the judgment on plaintiffs' invasion of privacy by intrusion and false light invasion of privacy claims, and affirm the remainder of the judgment. Our partial reversal has no effect upon the damage awards.

I. BACKGROUND

Plaintiffs William and Dorothy "Dee" Quigley are residents of Evergreen, Colorado, an upscale suburb in the foothills west of Denver. In August 1994, Mitchell and Candice Aronson moved into a house near the Quigleys. The initial interactions between the Quigleys and the Aronsons were positive. For example, the Quigleys hosted a "welcome party" so the Aronsons could become acquainted with the residents of the neighborhood. Within a month, however, the relationship between the Quigleys and the Aronsons in general, and the relationship between Mrs. Quigley and Mrs. Aronson in particular, soured.

In mid-August 1994, Mrs. Aronson, unbeknownst to Mr. and Mrs. Quigley, took two of the Quigleys' children (ages 14 and 9 at the time) to an R-rated movie. Mrs. Quigley expressed her concern about the incident to Mrs.

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[1] The federal wiretap act is formally known as the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 and the Communications Assistance for Law Enforcement Act of 1994, 18 U.S.C. §§ 2510-22. For purposes of brevity, we refer to it simply as "the federal wiretap act."

Aronson. In late September 1994, two of the Quigleys' children were standing outside their home when one of the Aronsons' vehicles, driven by a teenage neighbor and occupied by two of the Aronsons' children, swerved at the Quigley children. Mrs. Quigley again contacted Mrs. Aronson to express her concern. According to Mrs. Quigley, Mrs. Aronson confirmed that the sixteen-year-old neighbor had driven her children to school, but told Mrs. Quigley it was "none of [her] goddamn business." App. at 2117.

Many of the other precipitating events concerned the couples' dogs. In late August 1994, Mr. and Mrs. Quigley were outside their house planting bushes when their dog was attacked by the Aronsons' dog, "Bear." After the Quigleys separated the dogs, Mrs. Quigley called Mrs. Aronson to determine if Bear had been vaccinated. Mrs. Aronson allegedly told Mrs. Quigley that it was "none of [her] goddamn business," *id.* at 2104, refused to give her any information about Bear, and "let out a slew of obscenities," *id.* at 2105. In addition, Mrs. Aronson allegedly told Mrs. Quigley that the Quigley children were no longer welcome at the Aronsons' house, that they should stay at their end of the street, and that she (Mrs. Aronson) was tired of giving them sodas. In response, Mrs. Quigley allegedly told Mrs. Aronson that she had no respect for her. Mrs. Aronson allegedly replied, "fuck you." *Id.* at 2107.

According to the Quigleys, Bear continued to run loose in the neighborhood. In late September or early October 1994, Mrs. Quigley was in her driveway preparing to take her children somewhere when Bear appeared and began acting aggressively toward her ("hunkered down" in a "crouch" and "growling"). *Id.* at 2120. Immediately after the incident, Mrs. Quigley drove to the Aronsons' house, told Mr. Aronson what had occurred, and informed him

that she would contact the local animal control officer if there was another incident. According to Mrs. Quigley, Mr. Aronson said nothing and closed the door in her face.

Mrs. Quigley contacted the animal control office on two occasions in October 1994. On October 4, 1994, Officer James Riddle issued a warning notice to the Aronsons. According to Riddle, Mr. Aronson was "very relaxed about the situation and cordial," but Mrs. Aronson "was very upset, screaming and yelling." *Id.* at 4652. In particular, Mrs. Aronson stated "that she was going to 'get that bitch,'" *id.*, and wanted to issue a warning against the Quigleys. On October 12, 1994, Mrs. Quigley again contacted animal control regarding Bear. After Mrs. Quigley signed a "promise to appear and prosecute," *id.* at 4659, Officer Riddle issued a summons to the Aronsons.

According to Mrs. Quigley, Mrs. Aronson began acting more aggressively toward her following the second call to animal control. On several occasions when Mrs. Quigley walked her dog past the Aronsons' house, Mrs. Aronson allegedly stepped outside and yelled at Bear to "'go up there and get those pieces of shit [referring to Mrs. Quigley and her dog].'" *Id.* at 2136. On October 18, 1994, Mrs. Quigley was walking her dog in the neighborhood when Mr. and Mrs. Aronson allegedly approached in their vehicle and came to a "screeching halt behind [her]." *Id.* at 2138. Mrs. Aronson allegedly rolled down the passenger-side window of the vehicle and started screaming at Mrs. Quigley, calling her a "fat bitch" and telling her to "'get off the road, you piece of shit.'" *Id.* Mrs. Aronson allegedly continued yelling obscenities at Mrs. Quigley as the Aronsons pulled into their driveway. After getting out of their vehicle, Mrs. Aronson allegedly told Bear to "go get

the piece of shit [referring to Mrs. Quigley]," and said to Mrs. Quigley "you better watch your ass." *Id.*

Several critical events occurred on October 20, 1994. On that morning, Mr. Quigley was taking his son to school. As he started to drive down the street, Mr. Quigley observed one of the Aronsons' vehicles stopped in the middle of the street faced in his direction. Mr. Quigley drove his vehicle between the Aronsons' vehicle and a garbage dumpster that was by the edge of the street, apparently coming close to the Aronsons' vehicle. As Mr. Quigley passed the Aronsons' vehicle, he observed Mrs. Aronson inside the vehicle and concluded she was glaring at him. *Id.* at 1681-82.

At some point later that morning, Mr. and Mrs. Aronson, using a police scanner inside their home, overheard part of a conversation over a cordless telephone between Mrs. Quigley and a friend named Katie Ughetta in New York state. During the lengthy (approximately two-hour) conversation, Mrs. Quigley and Ms. Ughetta apparently discussed the growing dispute between the Quigleys and the Aronsons. The Aronsons recorded the conversation. At the end of the conversation, Mrs. Quigley and Ms. Ughetta bantered about the Aronsons:

> Ughetta: And keep up the good work to isolate the Aronsons. I'll be praying for you. They're outside (unintelligible).
>
> Quigley: Well, if something big happens, you know, like there's a house burning or something, I'll call you.
>
> Ughetta: Absolutely. Well, you can do that for – is it the 30th? Is that that Guy Hawkes Day? Guy Fox? Guy Fox Day?

Quigley: Guy Fuck Day?

* * *

Ughetta: Guy Fox? It's the English one where they burn the scarecrow in effigy. I believe it's Guy Fox. I can't remember (unintelligible).

Quigley: Well, I love the name, but I don't know what it means.

Ughetta: Yeah, I think they – I think something happened in British history where this guy was, like, you know, really bad news, like a serial killer like. . . .

Quigley: Jack the Ripper.

Ughetta: A Jack the Ripper kind of thing.

Quigley: Yeah.

Ughetta: I think that's what he was, and so every – every year, I think it's the day before Halloween, instead of celebrating Halloween, they celebrate Guy Fox Day and they burn . . .

Quigley: Oh.

Ughetta: . . . these scarecrow dummies in effigy of him.

Quigley: Oh.

Ughetta: So find out. Find out. That would be a good thing to do. Say, "Well, we figured that your roof was the best place to put this. So that the whole neighborhood could see it. I'm sorry that it burned down."

* * *

Quigley: (unintelligible) and we wanted, you know, we wanted everybody to see it. So we put it on the roof. Now, if I can't get a scarecrow, do you think I could douse a cross?

Ughetta: One of the kids. I think one of the kids would be fine. Yeah, a cross would be cool.

Quigley: A big cross and set that aflame?

Ughetta: Put a couple of hoods on top of it.

Quigley: Yeah, it's Halloween. We could just explain to the police, "You know, we're all dressed up. It's with our costume."

Ughetta: That's right. It'll have to be realistic to prove to people that we were pretending we were Klu Klux Klan members.

Quigley: Anti-Semitic? I don't think so, officer.

Ughetta: Right. That's like the Holocaust. Tape a big oven door on the side of their house.

Quigley: As if their front door is really an oven door. (unintelligible)

* * *

Ughetta: Throw a few ashes around the outside there.

Quigley: Yeah. We could throw some bars of soap and a lamp shade around the front, you know.

Ughetta: Oh, that is so (unintelligible)

Quigley: Sick, sick, sick. Oh, gosh.

Ughetta: Alright (unintelligible)

Quigley: Alright.

App. at 5601-05.

Later on the morning of October 20, 1994, the Aronsons overheard and recorded a cordless telephone conversation between Mrs. Quigley and Mr. Quigley, who was calling from his place of work. During the conversation, Mr. Quigley informed Mrs. Quigley of his encounter earlier that morning. Mr. Quigley stated that he drove between Mrs. Aronson's vehicle and a garbage can on the side of the street at "about 25 miles an hour" and that "it was very, very tight." *Id.* at 5606. Mr. Quigley also stated that he "thought about stopping," "pulling open the door [to Mrs. Aronson's vehicle] and throwing her on the ground." *Id.* at 5608. Mrs. Quigley responded: "Well, see, that's what they're trying to get us to do. So, you know, as long as there's a way around it, I don't care if you have to drive across the top of their property." *Id.* The Quigleys agreed "to just ignore them [the Aronsons]," and to have "absolutely no contact with them whatsoever." *Id.* The Quigleys continued, however, to discuss the situation:

> Mrs. Quigley: Well, I know that we're getting to them. The fact that this is the way they're behaving. She can't stand it.
>
> Mr. Quigley: Yeah.
>
> Mrs. Quigley: And I would much rather be in our shoes, you know, than her shoes. I mean, she's just spinning her wheels, and I'm telling you, eventually they will do something. They will blow this all out of the water, and they'll be totally wrong. They'll do something, and we'll come down on them like a ton a bricks.
>
> Mr. Quigley: Um-hum.

Mrs. Quigley: And there's already history with the County Sheriff.

Mr. Quigley: Right.

Mrs. Quigley: The Animal Control, and these were all separate.

Mr. Quigley: Yeah.

* * *

Mrs. Quigley: And when you make an Animal Control complaint it goes to the County Sheriff. So that property is going to keep popping up with their name on it and, you know, they're not going to fool anybody.

Mr. Quigley: Yeah.

Mrs. Quigley: And they don't have a clue as to how law enforcement works here.

Mr. Quigley: Well, they also think – they don't realize that people have – [such a] strong distaste for them right away, you know, because they're New Yorkians.

Mrs. Quigley: Yeah.

Mr. Quigley: So they don't realize people immediately are going to assume that they're the asshole.

Mrs. Quigley: Oh, yeah, and with the history, you know, it's already on track. That's all you need. . . .

* * *

Mrs. Quigley: You know, but this will be fine and, you know, we give them enough rope to hang themselves and they'll do it.

Mr. Quigley: Yeah. I just don't want to spend my life obsessing over them.

Mrs. Quigley: No, we won't.

Mr. Quigley: You know?

Mrs. Quigley: We won't, but I'm not going to let them get away with this kind of shit. When you consider everything that's happened, the way they've behaved through it.

Mr. Quigley: Well, and the way it affects the kids. The way our kids won't play in the street, they won't go out.

Mrs. Quigley: I – yeah. The language is so bad we can't let our kids out. Well, then, you know, you've got to stop it somehow, and if it means, you know, clipping their wings and going after them in other ways, then I don't have a problem with that, and they're wrong. When that damned dog is out, you know, I can't go out. Nobody can go out.

Mr. Quigley: Yeah.

Id. at 5615-21.

On the evening of October 20, 1994, Mrs. Aronson contacted the Jefferson County Sheriff's Department and reported that she had been sitting in her vehicle on the side of the street earlier that morning when Mr. Quigley drove directly at her at a high rate of speed, but swerved to avoid her at the last minute. A sheriff's deputy was dispatched to the neighborhood to investigate. After speaking with the Aronsons and the Quigleys, the deputy concluded no traffic violation could be substantiated.

On October 21, 1994, Mr. Aronson contacted the Denver office of the Anti-Defamation League (ADL) and reported that the Quigleys were engaging in threatening, anti-Semitic behavior. The ADL referred the Aronsons to Gary Lozow, a local attorney who specialized in criminal defense work, and who was a volunteer and board member for the ADL's Denver office and had been involved with the ADL in sponsoring Colorado's ethnic intimidation statute.

Lozow and the Aronsons met on October 22, 1994. Lozow's initial response was to determine whether it was legal for the Aronsons to overhear and record the Quigleys' cordless telephone conversations. With the help of an associate attorney, Richard Kornfeld, Lozow concluded that the Aronsons' activities were legal under state and federal law. Lozow contacted assistant district attorney Mark Pautler, an acquaintance and neighbor, to get his views on whether the Aronsons' activities were legal.[2] Pautler, like Lozow, concluded the activities were legal. Lozow then contacted the Aronsons, advised them of his conclusions, and suggested that they contact the district attorney's office.

In late October, the Aronsons met with Pautler to discuss their allegations. The Aronsons allege that Pautler directed them to continue recording the Quigleys' cordless telephone conversations, but Pautler denies doing so. In any event, it is uncontroverted that the Aronsons continued recording the Quigleys' telephone conversations and, on a regular basis, delivered copies of those recordings to

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[2] There is also evidence that Lozow contacted district attorney Dave Thomas for the same purpose.

Pautler. In early November, Bobbie Towbin, the associate director of the ADL's Denver office, contacted district attorney Dave Thomas to check on the status of any possible criminal proceedings against the Quigleys.

Between October 20 and November 1, 1994, the Aronsons recorded approximately eight conversations in which Mrs. Quigley referred to the Aronsons' Jewish faith. They also recorded various conversations of Mrs. Quigley with friends, family, and neighbors in which she mentioned taking some type of physical action toward the Aronsons or their home. Finally, the Aronsons recorded one conversation between Mr. and Mrs. Quigley in which Mr. Quigley referred to an "old boys' network" in the film industry in which he worked, and complained about a colleague getting ahead because he was Jewish. App. at 5746.

In early November, Lozow contacted Stuart Kritzer, a personal injury attorney who also volunteered with the ADL and sat on the local ADL board of directors. Lozow and Kritzer met with the Aronsons on or about November 5, 1994. Also present were Kornfeld (Lozow's associate) and Cindy Silverman, an employee of the ADL. At that meeting, the attendees discussed options available to the Aronsons for stopping the alleged anti-Semitic harassment by the Quigleys, including mediation, criminal charges against the Quigleys, a civil suit against the Quigleys, and publicizing the matter via a press conference or other means. The attendees also agreed that the Aronsons should continue recording the Quigleys' telephone conversations.

A subsequent meeting was held on November 8, 1994. Present at that meeting were the Aronsons, Lozow,

Kritzer, Kornfeld, and Towbin. The attendees again discussed their course of action. During the meeting, Towbin indicated that the ADL had several objectives, including "public exposure" of the Quigleys. *Id.* at 3566. Following the meeting, Kritzer and one of his associates (Andy Silverman, the husband of ADL employee Cindy Silverman) began listening to the recordings and drafting a civil complaint to be filed against the Quigleys.[3] At no time, however, did Kritzer or his associate, Lozow or his associate, or the ADL investigate the background of the Aronsons or the Quigleys, or speak with neighbors or other third-parties who might have information regarding the situation.

On December 1, 1994, Lozow and Kritzer entered into a contingent fee agreement with the Aronsons. On December 6, 1994, Lozow and Kritzer filed a civil complaint in federal court on behalf of the Aronsons. The complaint alleged that, "shortly after the [Aronsons] moved into their home . . . , they became the objects of religious, class-based invidiously discriminatory animus and conduct by the [Quigleys], who conspired with each other and others." *Id.* at 5162. To support this allegation, the complaint quoted or referred to various snippets from the Quigleys' recorded telephone conversations occurring between October 20 and November 1, 1994. The snippets included the Holocaust-related comments made by Mrs. Quigley during her

[3] Although the Aronsons continued to record the Quigleys' conversations, there was little contact between the couples during November and early December 1994. Indeed, the only incident involving the two couples occurred in mid-November, when the Aronsons called animal control to report that the Quigleys' dog was running loose on the Aronsons' property.

October 20, 1994, conversation with Ms. Ughetta, comments made by Mr. and Mrs. Quigley during their conversation of the same date discussing the vehicular incident with Mrs. Aronson, and other comments made by Mrs. Quigley during various telephone conversations. *Id.* at 5164-65 (e.g., telling a neighbor that the Aronsons had been stealing rocks from a builder's house across the street, telling a neighbor that "we're harassing" Mrs. Aronson, referring to Mr. Aronson as a "stinking piece of crap"). The complaint further alleged that, on October 20, 1994, Mr. Quigley "intentionally vehicularly assaulted Candice Aronson while she was parked across from her home by means of approaching her at high speed to within inches of her car, with the expressed intention of terrifying the Plaintiff and putting her in fear for her life and safety." *Id.* at 5163. Based upon these allegations, the complaint asserted claims for conspiracy to interfere with civil and property rights in violation of 42 U.S.C. §§ 1982 and 1985, ethnic intimidation in violation of Colo. Rev. Stat. § 13-21-106.5 and § 18-9-121, defamation-slander per se, assault, civil conspiracy, and outrageous conduct.

Later that same day, defendant Rosenthal, the director of the ADL's Denver office, prepared to hold a press conference concerning the Aronson/Quigley matter. In particular, Rosenthal drafted an "opening statement" that he intended to read at the outset of the press conference. *Id.* at 2775. In doing so, he allegedly relied on a copy of the civil complaint filed against the Quigleys. It is uncontroverted, however, that he never listened to the recorded phone conversations, read the transcriptions of those conversations, or spoke to the Aronsons, the Quigleys, or any other persons who might have direct knowledge of the dispute. Rosenthal asked Towbin and Kritzer to review the

draft. At the suggestion of Kritzer, Rosenthal agreed to omit a concluding paragraph concerning the potential filing of criminal charges against the Quigleys.

On December 7, 1994, Rosenthal, accompanied by the Aronsons and Kritzer, held a press conference at the ADL's Denver office. Rosenthal read his opening statement, which included the following remarks:

> *Almost immediately upon [the Aronsons'] arrival they became the targets of a vicious anti-Semitic campaign by their neighbors, William and Dorothy, known as Dee, Quigley. The purpose of this campaign – which Mrs. Quigley referred to as "Operation Aronson" – was to drive the Aronsons from their new home and neighborhood.
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> *This has been one of the most astonishing cases of anti-Semitic harassment our office has ever confronted. The consistency and frequency of threats, sustained over months, makes this a very different kind of anti-Semitic incident. Unlike the more typical case of an isolated verbal or physical assault, what we have here are dozens of instances of attempts to intimidate, threaten and do harm to the Aronsons and to conspire with others in the neighborhood to do the same.
>
> *The Quigleys engaged in all of the following activities among others. They threatened to burn a cross on the Aronson's property. Planned to tape a facsimile of an oven door on their home. Discussed plans to douse one of the Aronson children with a flammable liquid and to burn a scarecrow on their property. They have conspired with each other and others in the neighborhood to involve the homeowners association in driving

the Aronsons out. They defamed and slandered the Aronsons to their neighbors by attributing false behavior to them. And, ultimately, they threatened to commit bodily harm against the Aronson family using the term "blow him away" and asking neighbors to help in acquiring hand grenades and dynamite.

*On one occasion William Quigley sought to frighten Candice by driving his car at her at high speed while she was parked in her own vehicle. Swerving away at the last second to avoid a collision, Mr. Quigley and his wife later retold the story and bragged about his effort to their friends.

*William and Dee Quigley have proven themselves to be dangerous neighbors.

*We believe that the behavior in which the Quigleys have engaged is not only anti-Semitic, it is anti-Christian, anti-Democratic and anti-American. It is not the kind of behavior those of us who live in Colorado can or will tolerate. The filing of the lawsuit makes clear that this kind of activity will not go unchallenged or unpunished.

Id. at 5178-80. Rosenthal's comments at the press conference, including many of the above-described statements, were extensively quoted in the local media.

Later that same day, Rosenthal appeared on a radio program called the Greg Dobbs Show to discuss the Aronson/Quigley matter. During the show, Rosenthal made the following comments:

*This is a, this is a pretty astounding case of anti-semitism, and it reminds us that even when we get a little complacent and think that things

are calming down out there, there are some pretty nasty people hanging around looking to do harm.

*What makes this case particularly unique is the volume of the anti-semitic activity.

*In October, the Aronsons became aware that the Quigleys were engaged in, in what I am describing as a campaign of anti-semitism to try to drive the Aronsons out of the community. They were involved in trying to bring other neighbors into this process, conspiring and discussing with them possible violent acts. In the lawsuit we talk about them being engaged in a civil conspiracy with the neighbors.

*There was an attempted assault, vehicular assault.

*They had plans to . . . burn a cross on the Aronsons' lawn.

*There had even been a discussion in one of the conversations about dousing one of the Aronson children with a flammable liquid, and I think that the most frightening part of this is that they have discussed with their neighbors how to acquire weapons, . . . specifically hand grenades and dynamite, that could be used to, . . . presumably to blow up the home or their vehicle or in some other way to . . . attack their, their . . . domicile.

*We have the evidence to support and sustain these charges, . . . that evidence we believe in a court of law will stand up very comfortably against any form of scrutiny.

*When asked whether there were any friends of the Quigleys who were "disgusted" by

the Quigley's activities, Rosenthal responded: "I think . . . we are touching on an area here that the attorneys have advised us would be best not discussed publicly."

*Mr. Quigley repeatedly has expressed his animus towards individuals of the Jewish faith, and he even talks about describing his lack of satisfactory career progress as attributable to the superior success of his Jewish colleagues, and he attributes their success to being part of a . . . boys network of Jews.

*It was only with the accumulative evidence over a period of time that, that clearly convinced them, and certainly us, that this is an anti-semitic harassment, this is not just a neighborly dispute or misunderstanding.

*That's what makes it the worst [case of anti-Semitic behavior] that I've seen in so many years, since the [Alan] Berg murder, because it's . . . so massive in the number of acts that . . . the Quigleys engaged in against the Aronsons.

*The Aronsons have been concerned about the safety of their kids, and, you know, have not permitted the kids the kind of freedom to go about doing what, what teenagers would normally want to be doing at this point in their life, because they're just concerned about the extent to which the [Quigleys] might do them . . . bodily harm.

*It's not a two-sided story. It's hard for me . . . to convey that without your actually being able to know about the nature of the evidence. But, . . . the allegations that are in the lawsuit are based on words which Mr. and Mrs. Quigley have spoken. Not that we think they've spoken,

> or that they might have spoken, but that they, in fact, have spoken. Uh, so, it isn't a question of, you know, if you ask the Quigleys they would say that the Aronsons are terrible people and have engaged in a campaign to [throw] them out of the neighborhood, that's nonsense, it's not, it's not even plausible. The Aronsons haven't [done] anything, they simply moved into the house, and within weeks thereafter the Quigleys started this effort to get them thrown out of the neighborhood because they didn't want, as they referred to them, I can't even use the term because it's the 'f' word, those 'f' Jews in their community. And, uhm, that strikes me as, as one of those . . . questions that doesn't have two sides to it.
>
> *What I'm telling you is that the evidence is compelling, it's . . . non-controvertible, and it's overwhelming.

Id. at 5181-99.

Two days later, on December 9, 1994, the district attorney filed criminal charges against the Quigleys. In particular, Mr. Quigley was charged with felony menacing (i.e., using his vehicle to place Mrs. Aronson in fear of imminent serious bodily injury). Both Mr. and Mrs. Quigley were charged with ethnic intimidation and conspiracy to commit ethnic intimidation.

The ramifications of the lawsuit, the press conference, and the criminal charges were immediate and severe. Within days of the lawsuit being filed and the press conference, the Quigleys began receiving various types of hate mail, including two suspicious-looking packages that had to be opened by law enforcement authorities, as well as a box containing dog feces. The Quigleys also received mail from "militant wackos" who applauded what the

Quigleys had allegedly done to the Aronsons. *Id.* at 1841. Letters were sent to Mr. Quigley's employer, United Artists, threatening to boycott UA's theaters nationwide if UA failed to terminate Mr. Quigley. In mid-December 1994, the Quigleys attended their local church and were publicly denounced by their priest. For several months, the Quigleys shopped for groceries and necessities in other towns, and frequently used other names for fear of being recognized. Between December 1994 and February 1995, the Quigleys hired security officers to guard their home and to accompany Mrs. Quigley while shopping.

At some point in December 1994, Lozow and Kritzer learned that the federal wiretap act had been amended by Congress, effective October 25, 1994, to make it unlawful to intercept the radio portion of a cordless telephone call. Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290, 4291 (codified as amended at 18 U.S.C. § 2510(1) (deleting a provision that excluded the radio portion of cordless telephone communication transmitted between handset and base unit from definitions of "wire communication" and "electronic communication")) (current version at 18 U.S.C. §§ 2510, 2511 (1994)). Accordingly, they prepared and filed an amended civil complaint on behalf of the Aronsons that eliminated any references to taped conversations after October 25, 1994.

In January 1995, the Quigleys responded to the Aronsons' complaint, denying that they conspired to intimidate the Aronsons or violate the Aronsons' civil rights. The Quigleys also asserted counterclaims against the Aronsons, Rosenthal, and the ADL. In addition, the Quigleys filed a separate federal lawsuit asserting, in pertinent part, that Rosenthal and the ADL, through the actions of Lozow and Kritzer, violated the federal wiretap

act by intercepting and using the Quigleys' cordless telephone conversations. The lawsuit was consolidated with the lawsuit originally filed by the Aronsons.

On January 6, 1995, defendant Rosenthal directed a memo to Towbin, the associate director of ADL's Denver office, stating that he "wanted to be sure [they] were maximizing all opportunities ... available from the Aronson case." *Id.* at 2864. The memo directed Towbin to alert the Intermountain Jewish News about the Quigley/Aronson matter, and to keep the ADL's New York and Los Angeles offices up-to-date on the matter. Lastly, the memo directed Towbin to "make hay while the sun shines," but to do so "graciously." *Id.* at 2885-86.

The criminal charges filed against the Quigleys were assigned to assistant district attorney Steven Jensen for prosecution. After initially reviewing the case file, Jensen concluded that the sheriff's report was "pretty sparse" considering the serious nature of the charges. Jensen further learned that the sheriff's department had not interviewed any third-party witnesses. Jensen conducted his own investigation into the matter, including listening to many of the recorded phone conversations. After doing so, Jensen concluded that the telephone conversation between Mrs. Quigley and her friend on the morning of October 20, 1994, during which the two women briefly discussed Holocaust-related matters, was simply "venting" and "sick humor." *Id.* at 4237. Jensen further concluded that Mr. Quigley had made no bigoted or racist comments during any of the recorded conversations. On January 20, 1995, Jensen dismissed all charges against the Quigleys except for one charge against Mr. Quigley arising out of the October 20, 1994, incident where he had driven past Mrs. Aronson's vehicle.

The Quigleys filed suit against the district attorney. Those claims were settled in the fall of 1995 and, as part of the settlement, the district attorney published two letters of apology. In those letters, the district attorney stated he was not aware of any evidence proving that the Quigleys "violated Colorado's laws against ethnic intimidation," *id.* at 1869, or were "guilty of anti-Semitic conduct or harassment." *Id.* at 1871.

The Aronsons filed a lawsuit against Lozow and Kritzer in Colorado state court alleging, in part, that the attorneys failed to act solely for the Aronsons' benefit, but instead acted for their own benefit and/or the benefit of the ADL. The lawsuit further alleged that the attorneys failed to fully inform the Aronsons about their relationship with the ADL and that the relationship might pose a conflict of interest.

On February 20, 1998, Lozow, Kritzer, the Aronsons, and the Quigleys reached a settlement whereby Lozow and Kritzer paid monies to the Quigleys and the Aronsons, and all parties to the settlement agreed to release each other from liability for all federal and state civil claims. However, the settlement did not include the Quigleys' claims against the ADL or Rosenthal. The ADL reimbursed Lozow and Kritzer for the full amounts of the deductibles on their respective malpractice insurance policies.

Six of the Quigleys' claims against Rosenthal and the ADL proceeded to jury trial in April 2000. The jury found in favor of the Quigleys on five claims: (1) defamation against Rosenthal and the ADL based on statements made by Rosenthal during the December 7, 1994, press conference; (2) defamation against Rosenthal and the ADL based on statements made by Rosenthal during his December 7,

1994, appearance on the Greg Dobbs Show; (3) false light invasion of privacy against Rosenthal and the ADL based on statements made by Rosenthal during the same press conference and radio show; (4) invasion of privacy by intrusion against the ADL based on the interception and/or use of the Quigleys' private telephone calls by Towbin, Lozow, and/or Kritzer, acting as the ADL's agents or co-conspirators; and (5) violation of the federal wiretap act (18 U.S.C. § 2511(1)(d)) against the ADL based on the use of intercepted telephone calls by Lozow and/or Kritzer, acting as the ADL's agents or co-conspirators, in preparing and filing the Aronsons' lawsuit. The jury awarded Mr. Quigley damages in the following amounts: (1) $900,000 in economic damages; (2) $100,000 in non-economic damages; (3) state-law punitive damages of $500,000 against Rosenthal and $250,000 against the ADL; and (4) federal-law punitive damages of $5,000,000 against the ADL. The jury awarded Mrs. Quigley damages in the following amounts: (1) no economic damages; (2) $500,000 in non-economic damages; (3) state-law punitive damages of $500,000 against Rosenthal and $250,000 against the ADL; and (4) federal-law punitive damages of $2,500,000 against the ADL. The district court, pursuant to the defendants' post-trial motions, reduced the compensatory damage awards by $175,000 to "reflect the monies received by plaintiffs in their settlement with Lozow and Kritzer," and reduced Mrs. Quigley's "award of state-law punitive damages . . . to an amount equal to her compensatory damages of $325,000." *Id.* at 1527.

II.

Defamation

"Public concern"

Defendants contend the district court erred in concluding that the statements upon which plaintiffs based their defamation claims did not involve matters of "public concern." The statements at issue are those made by Rosenthal on December 7, 1994, at the press conference and during his later appearance on the Greg Dobbs Show. We review the issue de novo, not only because it was decided by the district court in the context of defendants' motion for summary judgment, *see Tax & Accounting Software Corp. v. United States,* 301 F.3d 1254, 1257 (10th Cir. 2002) (discussing standard of review applicable to district court decisions granting or denying motions for summary judgment), but also because it involved a question of law, *see Lewis v. McGraw-Hill Broadcasting Co.,* 832 P.2d 1118, 1121 (Colo. Ct. App. 1992) (concluding that, under Colorado law, "whether the matter involved is of public concern is a question of law for the court"); *see generally Salve Regina College v. Russell,* 499 U.S. 225, 231, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991) (discussing standard of review for questions of law).

State defamation laws are designed to "protect[ ] an individual's interest in his or her good name, providing a cause of action for damage to reputation caused by false statements." *Jefferson Sch. Dist. No. R-1 v. Moody's Investor's Serv., Inc.,* 175 F.3d 848, 852 (10th Cir. 1999). The First Amendment, however, serves competing interests, namely freedom of expression, and thus "limits the scope of state defamation laws." *Id.* For example, "the First Amendment prohibits public officials and public

figures from recovering damages for false and defamatory statements unless they demonstrate that the statement was made with actual malice," i.e., that the statement was known by the declarant to be false or was made with reckless disregard for its truth. *Id.*

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974), the Court refused to impose a federal constitutional standard with respect to allegedly defamatory statements made about private individuals. Instead, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347.

Consistent with *Gertz,* the Colorado Supreme Court has extended the *New York Times Co. v. Sullivan,* 376 U.S. 254, 279, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) "actual malice" standard of liability to cases where "a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern."[4] *Walker v. Colorado Springs Sun, Inc.,* 188 Colo. 86, 538 P.2d 450, 457 (1975); *see also Diversified Mgmt., Inc. v. The Denver Post, Inc.,* 653 P.2d 1103, 1106 (Colo. 1982) (refining "actual malice" standard of liability by "adopting the same definition of 'reckless

[4] Under Colorado law, if a private individual is involved and the matter is not one of "public or general concern," the plaintiff merely needs to establish fault amounting to negligence on the part of the defendant. *See Williams v. District Court,* 866 P.2d 908, 912 n.4 (Colo. 1993).

disregard' in cases involving public officials, public figures, and matter of public or general concern").

Defendants do not dispute that the Quigleys were private individuals at the time the alleged defamatory statements were made. Instead, defendants assert that the statements involved matters of public or general concern since they concerned a civil lawsuit alleging "that the Quigleys had conspired with others to deprive the Aronsons of their constitutional rights on the basis of their religion and race." Defs' Op. Br. at 26. The district court rejected defendants' arguments, concluding that defendants' statements did not relate to a matter of public or general concern:

> The bulk of the allegedly defamatory statements were based on excerpts of private telephone conversations between the Quigleys and other third parties which the Aronsons surreptitiously intercepted. In this regard, the Quigleys' position contrasts to that of the plaintiffs in *Diversified Management, Inc.,* in which the court found that alleged widespread and ongoing land-development schemes of questionable propriety constituted a matter of public concern strictly because the matter still had the potential to affect future buyers of lots which were yet-unsold. Similarly, in *Lewis,* the court found a matter of public interest existed in part because the plaintiff filed a civil lawsuit to "protest[ ] racially motivated policies of a large retail establishment which allegedly had been directed against her." Thus, in *Lewis,* in addition to the fact that the plaintiff had essentially thrust herself into a public debate through her lawyer's public commentary at a local meeting, the court relied on the fact that resolution of the issues could have

> an [effect] on other patrons of a commercial entity.
>
> At the time of the allegedly defamatory statements in this case, Rosenthal had received merely one unsolicited request from the press based on the filing of the [civil] lawsuit, as compared to the "immediate and widespread publicity from the various media organizations" which the filing of the underlying lawsuit in *Lewis* prompted. It was defendants' decision (arguably along with the Aronsons'), not the Quigleys', to amplify the matter by calling a press conference under the ADL name. Because, at the time of the press conference on December 7, 1994 – the original publication of the allegedly defamatory statements – the dispute between the Aronsons and the Quigleys was still essentially private, I conclude that the Quigleys were not public figures subject at that point, and Rosenthal's statements about them are, accordingly, not subject to the higher [actual malice] standard [of fault].

App. at 236-37 (internal citations omitted).

Unfortunately, Colorado law provides no clear set of guidelines for determining whether a matter is of "public concern."[5] *See Williams v. Continental Airlines, Inc.*, 943 P.2d 10, 17 (Colo. Ct. App. 1996) ("The boundaries of public concern cannot be readily defined, but must be determined on a case-by-case basis."). At best, the Colorado courts

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[5] The difficulty in determining whether a matter is of "public concern" is precisely why the Supreme Court eschewed adopting such a federal constitutional standard in *Gertz*. *See* 418 U.S. at 346.

have indicated that "a matter is of public concern whenever 'it embraces an issue about which information is needed or is appropriate,' or when 'the public may reasonably be expected to have a legitimate interest in what is being published.'" *Id.* (*quoting Lewis,* 832 P.2d at 1121); *see also Barrett v. Univ. of Colo. Health Sci. Ctr.,* 851 P.2d 258, 263 (Colo. Ct. App. 1993) (holding, in case involving public employee's constitutional right of free speech, that "the determination of whether . . . speech touches a matter of public concern rests on a particularized examination of each statement to determine whether it can be fairly considered as relating to any matter of political, social, or other concern to the community"). Further, the Colorado courts have indicated that "the balance should be struck in favor of a private plaintiff if his or her reputation has been injured by a non-media defendant in a purely private context." *Williams,* 943 P.2d at 18.

Applying these general standards to the facts presented here, it is apparent that the statements were made by a non-media defendant (Rosenthal) and concerned private plaintiffs (the Quigleys), rather than public officials or public figures. To that extent, the balance would seem to tip in favor of concluding that the matter was of private, rather than public, concern. On the other hand, defendants point to two factors they suggest tip the balance in favor of concluding the matter was of public concern. First, defendants note that Rosenthal was discussing allegations made in a civil lawsuit filed against the Quigleys. Although it is not completely clear, it appears that defendants are suggesting that civil litigation is always a matter of public concern. Second, defendants note that the civil lawsuit, and in turn Rosenthal's statements, concerned allegations of religious and ethnic

discrimination. According to defendants, any type of discrimination, including religious and ethnic discrimination, is necessarily a matter of public concern.

Addressing defendants' points in order, it is far from certain that all civil litigation is considered to be a matter of public concern under Colorado law. Perhaps the most analogous Colorado case is *Lewis,* where private plaintiffs sued media defendants for falsely reporting during a newscast that one of the plaintiffs previously had been arrested for obstruction of justice, indecent exposure, and prostitution. The Colorado Court of Appeals concluded that the incorrect statements "involved a subject matter of . . . public concern." 832 P.2d at 1121. In reaching this conclusion, the court noted "that the newscast emerged in the context of a persistent and concededly public controversy over [a major retailer's] policies towards minorities, a controversy triggered by publicity surrounding plaintiffs' $15 million lawsuit and their allegations of racially discriminatory policies by [the retailer]." *Id.* Although the existence of a civil lawsuit was a relevant factor in *Lewis,* nothing in the court's opinion suggests that the mere filing of a civil lawsuit, by itself, is sufficient to trigger "public concern." Rather, it appears clear that the content of the lawsuit is the critical factor. *See Lytle v. Wondrash,* 182 F.3d 1083, 1088 (9th Cir. 1999) ("To determine whether Lytle's litigation involved a matter of public concern, we must determine the content, form, and context of her lawsuit."); *Rice v. Ohio Dep't of Transp.,* 887 F.2d 716, 720-21 (6th Cir. 1989) (indicating that not every lawsuit is a matter of public concern), *vacated on other grounds,* 497 U.S. 1001, 111 L. Ed. 2d 744, 110 S. Ct. 3232 (1990); *Yatvin v. Madison Metro. Sch. Dist.,* 840 F.2d 412, 420 (7th Cir. 1988) (same); *cf. Time, Inc. v. Firestone,* 424 U.S. 448, 457,

47 L. Ed. 2d 154, 96 S. Ct. 958 (1976) ("The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times.*"); *but see* Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct,* 24 J. Legal Prof. 13, 60 (2000) (suggesting that "all civil lawsuits involve matters of public concern").

That leads to defendants' remaining point, i.e., that the allegations in the Aronsons' lawsuit of religious and/or ethnic discrimination were sufficient to trigger public concern. The defendants appear to be on stronger ground here. In *Connick v. Myers,* 461 U.S. 138, 148 n.8, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), the Court stated that "racial discrimination," at least in the context of public-employment, is "a matter inherently of public concern." The Colorado courts generally have followed suit. *E.g., Barrett,* 851 P.2d at 264 ("Speech which touches on a matter of public concern includes that which . . . seeks to expose discriminatory practices."); *Lewis,* 832 P.2d at 1121 (concluding matter of public concern existed where civil lawsuit alleged that major retailer had adopted a policy and practice of discriminating against black customers); *Gabel v. Jefferson Co. Sch. Dist. R-1,* 824 P.2d 26, 30 (Colo. Ct. App. 1991) (concluding allegations of reverse discrimination by public employer were matters inherently of public concern).

Notwithstanding this case law, two factors unique to this case weigh against the conclusion that the allegations in the Aronsons' lawsuit were a matter of public concern. First, unlike the cases cited above, the allegations of discrimination asserted in the Aronsons' lawsuit were not

asserted against a public employer, nor were they asserted against any entity or person with which the general public had contact (e.g., the major retailer in *Lewis*). Thus, there was no concern that the public's tax dollars were supporting discrimination (e.g., as in the instance of a public employer charged with discrimination), nor was there a concern that members of the public were likely to be harmed or discriminated against (e.g., as in the instance of a major retailer charged with discrimination). *See Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993) (concluding that employee's complaints of sex discrimination did not implicate matters of public concern because they did not implicate "system-wide discrimination" and instead "were motivated by and dealt with her individual employment situation"); *cf. Williams*, 943 P.2d at 18 (concluding public concern was not implicated where there was "no claim or evidence that plaintiff was an unsafe or less skilled pilot because he allegedly raped or attempted to rape women during off-duty hours," nor any evidence "that members of the flying public were in danger of being sexually assaulted by plaintiff").

Second, and most importantly, Rosenthal and the ADL were intimately familiar with the Aronsons and their allegations, having talked and met with the Aronsons, as well as with Lozow and Kritzer, on numerous occasions between late October and early December 1994. Unlike a third-party (e.g., newspaper reporter) unfamiliar with the parties to a lawsuit or its underlying facts, Rosenthal and the ADL were in a position to know, and indeed knew or should have known, that the allegations in the Aronsons' lawsuit were baseless. Accordingly, we are unable to conclude that Rosenthal's comments at the press conference and on the radio show involved matters of "public

concern" since Rosenthal and the ADL knew or should have known that the Aronsons' allegations of racial discrimination/harassment were not colorable.[6] *See Kemp v. State Bd. of Agric.*, 803 P.2d 498, 504 (Colo. 1990) ("When an employee alleges a colorable claim that a university is guilty of racial discrimination, it is a matter of public concern.") (emphasis added); *see generally Hutchinson v. Proxmire*, 443 U.S. 111, 135, 61 L. Ed. 2d 411, 99 S. Ct. 2675 (1979) ("those charged with defamation cannot, by their own conduct, create their own defense"); *Snead v. Redland Aggregates, Inc.*, 998 F.2d 1325, 1330 (5th Cir. 1993) ("A speaker cannot turn his speech into a matter of public concern simply by issuing a press release."). We agree with the district court that the statements made by Rosenthal at the press conference and during the radio show did not involve matters of public concern.[7]

Fair report privilege

Defendants assert the district court erred in refusing to give their tendered instruction regarding the common law doctrine of fair report, which provides a privilege to

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[6] We reject the dissent's suggestion that plaintiffs have conceded the subject of the lawsuit was a matter of public concern. The point of the language from plaintiffs' answer brief which is quoted by the dissent is that defendants cannot "create [their] own 'constitutional' defense by the very defamations at issue." Aplee. Br. at 32. In any event, a complete reading of the answer brief demonstrates that plaintiffs vigorously dispute defendants' "public concern" arguments.

[7] Our conclusion renders moot defendants' argument that the Quigleys failed to produce clear and convincing evidence of "actual malice" on the part of defendants in making the alleged defamatory statements.

reports of in-court proceedings if they are fair and substantially correct. *See Tonnessen v. Denver Publ'g Co.,* 5 P.3d 959, 964 (Colo. Ct. App. 2000). We review for abuse of discretion a district court's decision not to give a tendered jury instruction. *Allison v. Bank One-Denver,* 289 F.3d 1223, 1241 (10th Cir. 2002). In doing so, we also "consider the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law." *Id.; see also Hoffler v. State Personnel Bd.,* 7 P.3d 989, 990 (Colo. Ct. App. 1999) (indicating that the determination of a privilege, such as the fair report privilege, is a question of law).

The district court concluded that the fair report privilege was inapplicable under the facts presented. More specifically, the district court noted that the "Colorado courts had consistently adhered to the original Restatement rule which precludes a defamation defendant from invoking the judicial proceedings privilege on the basis of a filed complaint alone." App. at 239; *see id.* at 4864 (district court refused tendered instruction on the grounds that the judicial proceedings privilege was inapplicable under the facts presented).

We agree with the district court. Restatement (Second) of Torts § 611 states that "[a] report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are . . . reported," and that "publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section." *Id.,* Comment e. The Colorado Supreme Court adopted this rule in 1913, holding in *Meeker v. Post Printing & Publ'g Co.,* 55 Colo. 355, 135 P. 457, 458 (Colo. 1913), that the fair report privilege did not

apply to the reporting of the contents of pleadings "before any action had taken place on such pleadings." Although defendants assert that *Meeker* and its progeny do not reflect "the 'modern' and 'majority' rule in the United States," they fail to cite any Colorado cases overruling *Meeker*. Defs' Op. Br. at 34.

Even assuming, arguendo, that the Colorado courts would now overrule *Meeker* and conclude that the fair report privilege is applicable to allegations in a complaint, it would provide no relief for defendants. As outlined, it is clear that Rosenthal's statements at the press conference and on the Greg Dobbs Show went well beyond merely reporting the allegations in the Aronsons' complaint. *See* Restatement (Second) of Torts § 611, comment c, (noting that the privilege "extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public"). It is apparent from Rosenthal's statements that he was asserting, as a matter of fact, that the allegations in the Aronsons' complaint were true, and that he, the ADL, and the Aronsons had substantial evidence to support those allegations. Further, on several occasions, Rosenthal's comments went well beyond the allegations of the complaint.

Federal Wiretap Claims

Imputation of conduct to the ADL

At trial, the jury found that the ADL, in violation of the federal wiretap act, 18 U.S.C. §§ 2511(1)(d), 2520(a), "used" the contents of the Quigleys' cordless telephone conversations intercepted after October 25, 1994 (the effective date of the federal statutory prohibition on intercepting and using cordless telephone conversations),

to file the verified civil complaint against the Quigleys in December 1994.[8] Defendant ADL attacks the verdict and resulting judgment on the federal wiretap claims (the jury entered separate verdicts on those claims in favor of Mr. and Mrs. Quigley), asserting that it cannot be held responsible for the conduct of attorneys Lozow and Kritzer. More specifically, the ADL asserts that the district court committed two errors in instructing the jury with respect to the ADL's responsibility under the federal wiretap act for the attorneys' conduct, and that the district court erred in concluding there was sufficient evidence to support the jury's verdict on the federal wiretap claims under an agency theory.

Defendant ADL first contends the district court erred in instructing the jury that it could be found liable on plaintiffs' federal wiretap claims for having conspired with attorneys Lozow and Kritzer. *See* App. at 5041 (instruction on conspiracy theory). According to the ADL, there is no basis in the federal wiretap act for allowing the assertion of a conspiracy claim in a private cause of action brought under the act, nor would it have been proper for the district court to apply the substantive law of Colorado (i.e., that of civil conspiracy) to plaintiffs' claims arising under the federal act.

The initial problem with the ADL's argument is that it was not asserted in district court. In particular, there is no indication in the record, and no assertion by ADL in its appellate pleadings, that the ADL ever objected to the district court's instructions regarding the conspiracy

[8] Rosenthal was not a defendant on these claims.

theory. Thus, the issue has been waived, barring plain error. *See Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1142 (10th Cir. 2002). "The plain error exception in civil cases has been limited to errors which seriously affect the fairness, integrity or public reputation of judicial proceedings." *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001) (internal quotations omitted). Indeed, we have stated that "it is an extraordinary, nearly insurmountable burden." *Id.*

After review, we conclude that the ADL has failed to satisfy this extremely high burden. The ADL cannot credibly refute the plaintiffs' assertions that it acquiesced in the plaintiffs' conspiracy theory and the district court's conspiracy instructions.[9] Further, the ADL has failed to cite any case that holds that a person or entity cannot violate the federal wiretap act by joining with others in a conspiracy. In contrast, plaintiffs have cited a handful of cases that at least suggest or imply that it is possible for a person or entity to violate the federal wiretap act by conspiring with others. *E.g., Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492, 495 (4th Cir. 1995); *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994). Finally, as noted by plaintiffs, defendants urged the district court to utilize

[9] Although the ADL correctly asserts that the plaintiffs "did not plead a claim for conspiracy to violate the federal wiretap act in their consolidated Complaint, and none was contained in the Final Pretrial Order," Defs' Op. Br. at 35, that assertion misses the point. Plaintiffs alleged that the ADL violated the federal wiretap act by using the intercepted telephone conversations to prepare the civil complaint filed against the Quigleys. In support of this claim, the plaintiffs asserted two alternative theories of liability: (1) that Lozow and Kritzer acted as agents of the ADL, and (2) that the ADL conspired with Lozow and Kritzer.

a general verdict form on the federal wiretap claims, simply asking the jury to find whether the act was violated under either of plaintiffs' theories of liability (i.e., agency or conspiracy). *See generally Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1468 (10th Cir. 1992) ("A party who fails to bring to the trial court's attention ambiguities created by jury instructions or special verdict forms may not seek to take advantage of such ambiguities on appeal."). If the jury had been asked to make specific findings with respect to both theories, it would have been easy for this court to determine whether the alleged improper instructions on conspiracy warranted a reversal of the jury's verdict on the federal wiretap claims.

The ADL next contends that the district court erred in rejecting its tendered instruction on agency, which stated: "To determine whether a person is an agent, the most important factor to consider is whether the principal had the right to control the manner of work performed by the agent." App. at 532. The district court rejected the instruction on the grounds that it was "argumentative and unnecessary." *Id.* at 4841. The district court further stated that "the instructions on agency were adequately covered in the definition of agency to which the parties . . . stipulated." *Id.* at 4842.

We find no abuse of discretion on the part of the district court in rejecting the ADL's tendered instruction. Although control is certainly relevant to the existence of an agency relationship, *see* Restatement (Second) of Agency § 1 (defining "agency" as a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control"), the tendered instruction did not state that principle. Instead, the tendered instruction

referred to a principle controlling "the manner of work performed" by the agent, a requirement necessary only if an agent is alleged to be an employee as opposed to an independent contractor. *E.g. McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 (10th Cir. 1996); Restatement (Second) of Agency § 2 (defining "servant" and "independent contractor"). There was no assertion by plaintiffs in this case, however, that Lozow and Kritzer were employees of the ADL.[10] Instead, the sole issue was whether they functioned as agents (i.e., non-servant agents) for the ADL. Thus, the tendered instruction was not consistent with, or relevant to, that particular factual issue.

To the extent the ADL asserts the district court's instructions on agency failed to adequately discuss the issue of control in general, we conclude the assertion has been waived. Prior to trial, the parties submitted several stipulated instructions, one of which set forth a general definition of agency. App. at 561. The district court subsequently incorporated that stipulated instruction on agency into its own set of instructions. *Id.* at 5031. Although the ADL tendered the above-described instruction concerning a principal's right to control the manner of work performed by an agent, it otherwise made no objection to the district court's instructions on agency. In light of these facts, we conclude the ADL not only failed to raise a specific objection to the district court's instructions on agency, it effectively

[10] This is consistent with our statements in *McCarthy* that "attorneys are . . . independent contractors as well as agents," and that, accordingly, they "exercise exclusive control of the manner of performing [their legal work,] being responsible [to the client] only for the result." 80 F.3d at 853 (internal quotations omitted).

invited any alleged error in those instructions by joining in offering the stipulated instruction on agency which the district court ultimately adopted. *See Aves ex rel. Aves v. Shah,* 997 F.2d 762, 766 (10th Cir. 1993) (declining to review instruction for plain error where party objecting to instruction on appeal was the one who offered the instruction at trial).

The ADL contends that plaintiffs failed to present sufficient evidence to demonstrate that Lozow and Kritzer were the agents of the ADL because "there was no evidence that the ADL had the ability to control the conduct of Lozow and Kritzer in those private attorneys' legal representation of the Aronsons." Defs' Op. Br. at 41. We believe the ADL's arguments miss the point. Although the existence of a principal/agent relationship certainly hinged on one or both of the attorneys agreeing to act on the ADL's behalf, i.e., subject generally to the ADL's control, it was unnecessary for the ADL to have the ability to control the particular manner of the attorneys' work, or for the ADL to have the ability to control the attorneys' representation of the Aronsons. Indeed, as noted in the district court's jury instructions, it was possible that the attorneys served as agents for both the ADL and the Aronsons (even though their interests may have been conflicting).

In any event, we conclude there was sufficient evidence of a principal/agent relationship to allow the issue to go to the jury. *See generally Lantec, Inc. v. Novell, Inc.,* 306 F.3d 1003, 1023 (10th Cir. 2002) (discussing standard of appellate review applicable to district court's ruling on motion for judgment as a matter of law). This evidence was succinctly described by the district court in denying defendants' post-trial motion for judgment as a matter of law:

As I stated in colloquy with counsel for both sides during defendants' motion for judgment as a matter of law at the close of plaintiffs' case in chief, the question of agency is a close one with facts pointing both ways. Notwithstanding the testimony of Lozow and Kritzer that they were not acting on behalf of the ADL in pursuing the Aronsons' lawsuit against plaintiffs, there is evidence in the record to support a contrary inference. One example is the ADL's payment of Lozow and Kritzer's insurance deductible in their settlement with plaintiffs and the Aronsons. As I noted in the hearing on defendants' motion for judgment as matter of law, the jury could reasonably infer that the ADL's payment was an admission by the ADL that Lozow and Kritzer had an association with the ADL or that the ADL put Lozow or Kritzer in a position where they sustained losses while acting for the ADL.

In addition, . . . there is dispute as to whose interests Lozow and Kritzer were really serving. . . . Evidence was introduced at trial which supports a finding that Lozow and Kritzer shared the ADL's concern about anti-Semitism and education of the public about these concerns, so that the jury could reasonably infer that Lozow and Kritzer were, at various times, motivated by a desire to expose what they perceived to be plaintiffs' anti-Semitism. There is also evidence in the record from which a jury could reasonably infer that Lozow and Kritzer preferred the interests of the ADL over those of the Aronsons insofar as Lozow and Kritzer sided with the

> ADL in holding the December 7, 1994, press conference against the wishes of Mr. Aronson.

App. at 1492-93.[11]

First Amendment protection

The ADL contends that even if it violated the federal wiretap act by "using" the intercepted telephone conversations in preparing and filing the civil complaint against the Quigleys, that "use" was protected by the First Amendment. In other words, the ADL contends that the First Amendment would apply to protect it from liability in this case under the federal wiretap act. The district court rejected the ADL's argument during trial. Because the issue raised by the ADL is one of law, our scope of review is de novo. *See generally Salve Regina College,* 499 U.S. at 231.

In support of its argument, the ADL relies heavily on *Bartnicki v. Vopper,* 532 U.S. 514, 149 L. Ed. 2d 787, 121 S. Ct. 1753 (2001), which was decided after the trial in this case. In *Bartnicki,* an unidentified person intercepted and recorded a cellular telephone conversation between the president of a local teachers' union and the union's chief negotiator. The conversation concerned the status of

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[11] We note that Rosenthal, in his opening statement and during his appearance on the Greg Dobbs Show, made statements that also lend support to the notion that a principal/agent relationship existed between the ADL and the attorneys. For example, in his opening statement, Rosenthal indicated that the ADL had helped "craft an appropriate strategy." App. at 5179. Likewise, during his appearance on the radio show, Rosenthal stated that the ADL was "facilitating for the Aronsons their legal recourse." *Id.* at 5197.

negotiations between the union and the local school board, and included references to a potential strike by the union, a discussion of a potential response to the "board's intransigence," and references to "going to the[ ] . . . homes" of the board members, "blowing off their front porches," and "doing some work" on the board members. 532 U.S. at 518-19. The recording of the conversation subsequently wound up in the hands of a radio commentator, who played the tape "on his public affairs talk show." *Id.* at 519. "Another station also broadcast the tape, and local newspapers published its contents." *Id.* The two people whose conversation was recorded filed suit against various media representatives asserting, in part, that the broadcast of the tape violated the federal wiretap act. The media defendants moved for summary judgment arguing, in part, that their disclosures of the tape were protected by the First Amendment. The district court rejected the defendants' argument, but the Third Circuit reversed, concluding that the federal wiretap act was "invalid because [it] deterred significantly more speech than necessary to protect the privacy interests at stake." 532 U.S. at 522. The Supreme Court subsequently granted certiorari to review the matter.

At the beginning of its opinion, the Supreme Court emphasized that the case "presented a conflict between interests of the highest order – on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech." *Id.* at 518. Continuing, the Court noted that "the disclosure of the contents" of the intercepted telephone conversation "violated the federal" wiretap act, and that "the only question was whether the application of the[ ] statute[ ] in such circumstances

violated the First Amendment." 532 U.S. at 525. Although the Court acknowledged the wiretap act served an important purpose by protecting the privacy of communications, *id.* at 532-33, it emphasized that, under the facts before it, the application of the act "implicated the core purposes of the First Amendment" by "imposing sanctions on the publication of truthful information of public concern." 532 U.S. at 533-34. Ultimately, the Court concluded that the privacy concerns at issue had to "give way when balanced against the interest in publishing matters of public importance." *Id.* at 534. Thus, the Court agreed that the defendants were immune from liability under the federal wiretap act.

Contrary to the ADL's assertions, we conclude the instant case is distinguishable from *Bartnicki* in a number of respects. First, and most importantly, the contents of the Quigleys' intercepted telephone conversations were not matters of public concern. Although the ADL asserts otherwise, it is apparent after listening to those recorded conversations that the Quigleys were engaging in what they thought was private discussion with each other or with friends and family regarding their ongoing dispute with the Aronsons. Although the Quigleys (primarily Mrs. Quigley) sometimes engaged in derogatory banter about the Aronsons, it is apparent that those comments represented nothing more than private thoughts about an inherently private matter. Further, as previously discussed, there is no credible basis for concluding, as suggested by the defendants, that the Quigleys were engaged in an anti-Semitic campaign to harass the Aronsons and force them out of the neighborhood (indeed, the jury's findings clearly refute the defendants' arguments on this

point). Thus, any First Amendment interest in publishing those private remarks was considerably less significant than the First Amendment interest at issue in *Bartnicki*.[12] Second, unlike the defendants in *Bartnicki,* the defendants in this case did not accurately portray the contents of the Quigleys' recorded telephone conversations. In *Bartnicki,* the defendants broadcast the recorded conversation and printed a transcript of the conversation. Here, in contrast, the defendants merely used snippets of the Quigleys' conversations in preparing the Aronsons' civil complaint, and inaccurately portrayed those comments as demonstrating the existence of an anti-Semitic campaign on the part of the Quigleys against the Aronsons. Third, although the jury in this case found that the ADL did nothing to "procure" the recorded conversations, it was uncontroverted that the ADL, from the time of its first contacts with the Aronsons in late October 1994, knew that the Aronsons were the persons responsible for recording the Quigleys' telephone conversations. Further, it was uncontroverted that the ADL knew, during November and early December 1994, that the Aronsons were continuing to record the Aronsons' [sic] telephone conversations. This is in contrast to the media defendants in *Bartnicki,* who "found out about the interception [at issue] only after it occurred, and in fact never learned the identity of the person or persons who made the interception." 532 U.S. at 525.

It is true that the Court in *Bartnicki* left open the question of whether the interest in protecting the privacy

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[12] The ADL concedes that "the right to petition the government and to engage in public speech through the filing of lawsuits may not enjoy the protection afforded by *Bartnicki*'s holding in a civil case of purely private significance." Defs.' Op. Br. at 49.

of communications "is strong enough to justify the application of" the federal wiretap act "to disclosures . . . of purely private concern." *Id.* at 533. Nonetheless, we are persuaded that, if faced with the issue, the Court would conclude that the interest in privacy is sufficient to allow the federal wiretap act to be applied to situations, such as the case here, involving the "use" of intercepted telephone conversations concerning purely private matters. Thus, we hold that application of the federal wiretap act to the ADL's actions in this case does not violate the First Amendment.

Punitive damages

The federal wiretap act provides that, in a civil action thereunder, "appropriate relief includes" "punitive damages in appropriate cases." 18 U.S.C. § 2520(b)(2). Only the Eighth and Ninth Circuits have interpreted this provision, both agreeing that to receive punitive damages, a plaintiff proceeding under the federal wiretap act "must show that defendants acted wantonly, recklessly, or maliciously." *Jacobson v. Rose,* 592 F.2d 515, 520 (9th Cir. 1978); *see Bess v. Bess,* 929 F.2d 1332, 1335 (8th Cir. 1991). This is the standard applied by the district court in the case at hand, and the ADL does not dispute its general applicability. The ADL contends, however, that the district court erred in submitting the issue of punitive damages on the federal wiretap claims to the jury, and in denying the ADL's post-trial motion to set aside those punitive damage awards.

The ADL contends it cannot be held liable for punitive damages under the federal wiretap act because there was no evidence that it authorized, approved, or ratified

Lozow's and Kritzer's use of the intercepted phone conversations and the jury was not asked to make such a finding. The ADL first raised this issue, in part, in its post-trial motion to amend or reduce judgment, for a new trial, or for judgment as a matter of law.[13] App. at 1285-86 (citing Colorado law on the issue of whether a principal can be held liable for punitive damages for the acts of an agent). The district court rejected the ADL's argument:

> Evidence adduced at trial . . . demonstrated that Towbin and other ADL employees were aware of the Aronsons' interception and recording of plaintiffs' telephone conversations. The evidence also demonstrated that ADL employees attended meetings with the Aronsons, Lozow, and Kritzer to discuss the progress of the criminal investigation of plaintiffs as well as how to proceed in a civil action against plaintiffs. Furthermore, there is evidence that Kritzer advised the ADL that he would contact ADL members to discuss strategy before filing the Aronsons' complaint. Based on this evidence, a jury could reasonably find that, at a minimum, the ADL approved of Kritzer's use of the intercepted telephone conversations in

[13] Although the ADL attempts to do so now, it did not complain at trial or in its post-trial motion that the issue was not submitted to the jury for consideration. That issue has been waived for purposes of appeal. *See Tele-Communications, Inc. v. Commissioner*, 104 F.3d 1229, 1233 (10th Cir. 1997). In any event, it is clear from the jury instructions that the jury was asked to determine (a) whether Lozow and Kritzer were agents or co-conspirators of the ADL, and (b) whether the defendants' conduct was wanton and reckless, thereby justifying punitive damages under federal law. Contrary to the ADL's assertions, we conclude there is no plain error arising out of the court's failure to instruct the jury on the issue of authorization, approval, or ratification by the ADL.

> preparing and filing the Aronsons' complaint. Towbin and Rosenthal's testimony to the contrary simply raised a credibility issue for the jury to resolve. I see no reason to disturb the jury's determination. Consequently, because I am compelled to draw every reasonable inference in plaintiffs' favor, I conclude that there is sufficient evidence in the record to support a finding that the ADL approved of Lozow and Kritzer's use of the intercepted telephone calls in preparing the Aronsons' complaint.

App. at 1499-1500 (internal citation omitted).

We review the district court's denial of defendants' post-trial motion de novo, employing the same standard as the district court. *Lantec,* 306 F.3d at 1023. "Judgment as a matter of law is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Id.* (internal quotations omitted).

After reviewing the trial transcript, we conclude the district court properly rejected defendants' motion. It was uncontroverted that ADL employees were in regular contact with the Aronsons from late October until early December 1994, and, during that time period, met with the Aronsons, Lozow, and Kritzer as they formulated a strategy to deal with the Quigleys' alleged anti-Semitic conduct. It was further uncontroverted that ADL employees, including Towbin and others, were well aware that comments made by the Quigleys (primarily Mrs. Quigley) during the recorded telephone conversations provided the primary basis for the conclusion that the Quigleys were engaging in anti-Semitic conduct. Moreover, the ADL, through its employees, was well aware that Lozow and

Kritzer were considering filing a civil complaint on the Aronsons' behalf against the Quigleys, and the jury reasonably could have inferred from the evidence that the ADL, through the actions of Towbin and other employees, promoted that strategy. Lastly, it was uncontroverted that the ADL (through its national headquarters and general counsel) ultimately reimbursed Lozow and Kritzer for the amounts they paid in settlement to the Quigleys and the Aronsons.[14] Based upon this evidence, the jury reasonably could have inferred that the ADL was ratifying the attorneys' conduct in filing suit against the Quigleys. *See generally Dilley v. SuperValu, Inc.*, 296 F.3d 958, 966 (10th Cir. 2002) ("Whether sufficient evidence exists to support punitive damages is a question of law reviewed de novo.") (internal quotations omitted).

The ADL has raised a number of related arguments in its appellate brief, the most notable of which is that the First Amendment right of association prohibits the imputation of any liability for the tortious acts of local agents unless the national ADL organization expressly authorized, approved, or ratified those acts. In other words, the ADL asserts that its national headquarters never "authorized" or "ratified" the actions of its Denver branch. Because

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[14] Defendants suggest that this evidence should not be considered in light of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982). That case is distinguishable, however, because the NAACP in that case "posted bond and provided legal representation for arrested boycott violators," and the evidence indicated that the NAACP "regularly provided such assistance to indigent black persons throughout the country." 458 U.S. at 931 n.78. Here, in contrast, there was no evidence that the ADL regularly reimbursed attorneys for expenses incurred in pursuing civil actions on behalf of persons referred to them by the ADL.

these arguments were not raised in the district court, however, they are waived for purposes of appeal. *See Tele-Communications, Inc. v. Comm'r of Internal Revenue,* 104 F.3d 1229, 1233 (10th Cir. 1997).

The ADL asserts that the good faith belief of Lozow and Kritzer in the lawfulness of their conduct (i.e., that it was legal for the Aronsons to intercept and record the telephone calls) prevents the imposition of punitive damages on the federal wiretap claims. The ADL asserted this argument in district court in the context of its post-trial motion for new trial or judgment as a matter of law. The district court rejected the argument:

> Although evidence that a defendant believed he was acting lawfully is pertinent to a determination of whether he acted with the sufficient state of mind to make the award of punitive damages appropriate, I do not find it to be dispositive of the issue. Rather, it is one of several factors for the jury to weigh in its consideration of whether to award punitive damages. Here, the ADL focuses exclusively on the fact that Lozow and Kritzer believed that the interception of cordless telephone calls was lawful based upon Lozow and Kornfeld's research as well as the representations of Pautler and Thomas. What the ADL ignores, however, is evidence concerning the "use" of the intercepted telephone calls. Kritzer was the lead attorney in preparing the Aronsons' complaint. This position enabled him to select which intercepted comments to include in the amended complaint and the context in which they would appear. Kritzer also attended two meetings with the Aronsons and the ADL in which it was stated that one of the objectives of all those in attendance was to publicize what

> they believed to be plaintiffs' anti-Semitic conduct, despite knowing the potential implications that such a public disclosure could have on Mr. Quigley's career. The jury could reasonably infer that, in furtherance of this objective, Kritzer selected only isolated snippets of the hours of illegally taped conversations to frame the Aronsons' complaint in a light favorable to the ADL's objective of publically touting the Aronsons' complaint as a "major case of anti-Semitism." Furthermore, nothing compelled Kritzer's use of the intercepted telephone conversations in preparing the complaint. On this evidence, the jury could have found by a preponderance of the evidence that Kritzer's action, and by extension the ADL's action, was taken with utter disregard to the serious consequences that would follow allegations of anti-Semitism lodged against plaintiffs.

App. at 1497-98 (internal citation omitted).

Reviewing the issue de novo, we likewise reject the ADL's arguments. The ADL's alleged "good faith belief" in the legality of its conduct was based on the initial legal conclusions reached by Lozow and his associate in late October 1994. More specifically, Lozow and his associate concluded, after researching the matter themselves and after speaking with the district attorney and an assistant district attorney, that it was legal for the Aronsons to intercept and record the Quigleys' telephone conversations. Nothing in the record indicates that Lozow or Kritzer, or their respective associates, investigated the question of whether it was legal for them to disclose or otherwise "use" the contents of those recorded conversations. Indeed, had they researched the matter prior to filing the civil complaint in early December 1994, they may well have (and indeed should have) discovered that

such "use" was illegal.[15] Further, as pointed out by the district court, Lozow and Kritzer did not accurately report the contents of the recorded telephone conversations. Instead, they took snippets of those conversations out of context in an attempt to support their claims of anti-Semitic harassment on the part of the Quigleys. Indeed, viewed in the light most favorable to the Quigleys, the evidence suggests that Lozow and Kritzer used the snippets of conversation to falsely portray the Quigleys as anti-Semitic extremists willing to use aggressive and violent

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[15] The dissent suggests the attorneys' research concerning the legality of intercepting and recording the Quigleys' telephone conversations reasonably allowed them to conclude the "use" of tape-recorded telephone conversations was likewise legal. We disagree. In our view, the "use" of tape-recorded telephone conversations is a discrete legal issue under the federal wiretap act. *Compare* 18 U.S.C. § 2511(1)(a) (concerning the interception of communications) *with* 18 U.S.C. § 2511(1)(d) (concerning the use of intercepted communications). Further, there is no evidence in the record that the attorneys researched or even considered the legality of using the tape-recorded conversations.

We also reject the dissent's suggestions that (a) it was unnecessary for the attorneys to revisit their research in early December 1994 (prior to filing the civil action), or (b) that had they done so, they reasonably could not have been expected to uncover the October 1994 amendment to the federal wiretap statute. In our view, a reasonably competent attorney researching the issue in December 1994 would have discovered the October 1994 amendment. *See generally Texaco, Inc. v. Short*, 454 U.S. 516, 531, 70 L. Ed. 2d 738, 102 S. Ct. 781 (1982) ("It is . . . settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to [legislative] judgment.").

In the end, we believe the attorneys' failure to research the issue, combined with their use of the tape-recorded conversations, constituted "an extreme departure from ordinary care, in a situation where a high degree of danger was apparent." *Keeton*, *supra* at 214.

tactics to drive the Aronsons from the neighborhood. In light of all these circumstances, we conclude the district court was correct in allowing the punitive damage issue to go to the jury, and that there was a basis for the jury's decision to award such damages. *See* App. at 5047 (district court's jury instruction stating that, for purposes of determining punitive damages under the federal wiretap act, "an act is wanton and reckless . . . if it is done in such a manner and under such circumstances as to reflect utter disregard for the potential consequences of the act . . . on the safety and rights of others")[16]; *Smith v. Wade,* 461 U.S. 30, 33, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (affirming similar punitive damage instruction employed in case arising under 42 U.S.C. § 1983); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* 213-14 (5th ed. 1984) (defining terms "wanton" and "reckless").

The ADL also contends the district court erred in instructing the jury regarding the alleged good faith belief of Lozow and Kritzer. In particular, the ADL notes that the district court instructed the jury that the ADL's good faith belief was "irrelevant to [its] consideration of [the ADL's] liability upon the claims for violation of the Federal Wiretap Act," and that the ADL was "presumed to know the law, including the requirements of the Federal Wiretap Act." App. at 5043. According to the ADL, it was possible that the jury "could have understood this as a command to

[16] Although the dissent questions whether the district court's punitive damage instruction was a correct statement of the applicable law, it is undisputed that the ADL has not challenged this instruction on appeal. Nor, for that matter, did the ADL challenge the punitive damage instruction in the district court.

disregard the defendants' good faith belief . . . when considering the defendants' liability for punitive damages." Defs' Op. Br. at 52-53.

We reject the ADL's arguments for several reasons. First, it is clear from the record that the ADL did not object to the jury instruction about which it now complains. Although the dissent suggests the ADL was relieved from doing so because the district court stated at the outset of the instruction conference that it would assume the parties were "objecting to everything," we disagree. A complete reading of the transcript of the instruction conference indicates the district court allowed the parties to make specific objections to the proposed instructions and that, on several occasions, the ADL did object. Thus, this case is distinguishable from *Harrison v. United States*, 296 F.3d 994, 1002 (10th Cir. 2002) (concluding district court definitively ruled on defendant's objection to admission of evidence where court denied defendant's motion in limine and "made clear to defense counsel that it did not wish to hear repetitive argument on the matter"), the sole case cited by the dissent. Second, even assuming the ADL's objections were properly preserved, we conclude the instruction was consistent with the law and the evidence. The instruction stated the unremarkable proposition that a defendant is presumed to know the law, *e.g.*, *Atkins v. Parker*, 472 U.S. 115, 130, 86 L. Ed. 2d 81, 105 S. Ct. 2520 (1985) ("All citizens are presumptively charged with knowledge of the law."), a presumption the ADL failed, as a matter of law, to rebut. Finally, we note the instruction at issue pertained to the ADL's general liability under the federal wiretap act and not its liability for punitive damages thereunder. Notably, the district court segregated its instructions on general

liability under the federal wiretap act from its instructions on punitive damages under the act. *See* App. at 5041-43 (discussing general liability), 5045-48 (discussing punitive damages). In doing so, the district court instructed the jury that "the standards for the award of [punitive] damages were different, and the burden of proof was different." App. at 5047. Because juries are presumed to have followed the instructions given to them by the district court, *see Smith v. Diffee Ford Lincoln-Mercury, Inc.*, 298 F.3d 955, 966 (10th Cir. 2002), we fail to see how the instruction to which the ADL now objects impacted the jury's consideration of punitive damages.

The ADL asserts that the punitive damage awards on the federal wiretap claims violate the First Amendment, since they were based "on the content of the defendant's petitioning and speech activities." Defs' Op. Br. at 53. More specifically, the ADL asserts that "punitive damages cannot be imposed for the false content of speech on a matter of public concern unless the factfinder determines both falsity and actual malice under the 'clear and convincing' evidence standard." *Id.* at 54. It is unclear from the record whether this argument was ever raised in the district court. Assuming that it was, we conclude it has no merit. As previously discussed, there are several reasons why the First Amendment provides no refuge for the ADL in this case, including the fact that the contents of the recorded telephone conversations were purely private matters, rather than matters of public concern, and because the contents of those conversations were not accurately reported by defendants.

Finally, the ADL asserts that the punitive damage award violates due process because the "selectivity by an advocate in framing the allegations of court pleadings . . .

is in no way connected to the purpose of the pertinent provisions of the federal wiretap statute, which is 'to protect effectively the privacy of wire and oral communications.'" Defs' Op. Br. at 54 (quoting *Bartnicki,* 532 U.S. at 523). Because this issue was not raised in the district court, it has been waived for purposes of appeal.[17]

Invasion of privacy by intrusion

Defendants contend the district court erred in instructing the jury with respect to plaintiffs' invasion of privacy by intrusion claims. As noted by defendants, the district court instructed the jury that it could find in favor of plaintiffs on those claims if they found the defendants had either intercepted the Quigleys' private telephone conversations on or after October 25, 1994 (the date on which intercepting and taping became illegal under federal law), or had "used" the contents of those conversations. App. at 4872, 5027-28. Defendants contend the "use" portion of the instructions was erroneous because "Colorado[ ] tort law does not recognize a cause of action for invasion of privacy for mere 'use' of information that was lawfully obtained from others without committing any act

[17] Even if the issue had not been waived, it has no merit. As outlined above, the punitive damage award was not based solely on the content of the civil complaint, but rather because (a) Lozow and Kritzer failed to determine whether their "use" of the recorded conversations was legal, (b) failed to accurately report the contents of those conversations, and (c) conceivably acted with an intent to harm the reputation of the Quigleys. *See Smoot v. United Transp. Union,* 246 F.3d 633, 648 (6th Cir. 2001) (affirming district court's award of punitive damages under the federal wiretap act where the defendant attempted to damage plaintiffs' reputations by distributing illegally intercepted communication between the plaintiffs).

of intrusion into a zone of privacy." Defs' Op. Br. at 56. Because defendants failed to raise this argument in the district court, we review only for plain error. *See Telecor,* 305 F.3d at 1142.

Colorado law recognizes three separate categories of invasion of privacy claims. *Denver Publ'g Co. v. Bueno,* 54 P.3d 893, 897 (Colo. 2002). These include: (1) unreasonable intrusion upon the seclusion of another ("intrusion"); (2) publicity that unreasonably places another in a false light before the public ("disclosure"); and (3) appropriation of another's name or likeness ("appropriation"). *Id.* at 896. At issue here is the first category – intrusion. This tort "focuses on the manner in which information that a person has kept private has been obtained," *Doe v. High-Tech Inst., Inc.,* 972 P.2d 1060, 1065 (Colo. Ct. App. 1998), and thus can encompass conduct such as eavesdropping by wiretapping and persistent and unwanted telephone calls. *Id.* at 1067. To prevail on a claim of invasion of privacy by intrusion, "a plaintiff must show that another has intentionally intruded, physically or otherwise, upon the plaintiff's seclusion or solitude, and such intrusion would be considered offensive by a reasonable person." *Id.*

Although it is clear that the interception of the Quigleys' telephone conversations would constitute an intentional intrusion on the Quigleys' seclusion or solitude, the issue raised by defendants is whether, as set forth in the district court's instructions, the "use" of intercepted telephone conversations can also constitute such an intrusion. We conclude the answer to this question is "no." In particular, once the interception of the conversations was complete, any subsequent "use" of the conversations could not have resulted in any additional intrusion on the Quigleys' seclusion or solitude. Certainly, the "use" of such

conversations might have resulted in another type of invasion of privacy, i.e., unreasonable publicity given to another's private life. But no such claim was asserted in this case. We therefore conclude that the district court committed plain error in instructing the jury on plaintiffs' invasion of privacy by intrusion claims, and that such error warrants a reversal of the judgment on those claims.

We emphasize, however, that the reversal of those judgments does not require a remand, nor does it have any impact on the damage awards that are incorporated into the final judgment. At the urging of the defendants, and over plaintiffs' objection, the district court utilized a verdict form asking the jury to award compensatory damages in one lump-sum (albeit divided into economic and non-economic damages) for all of the claims (both state and federal) upon which they found in plaintiffs' favor. App. at 4883-86 (discussion of verdict form at instruction conference). In doing so, the district court concluded, without objection from the defendants, that the damages for each of the state law and federal claims were "the same." *Id.* at 4884. The jury, in turn, found the ADL liable on five separate claims (i.e., four state law tort claims and one federal claim), but awarded only one lump-sum compensatory damage award to each of the plaintiffs. Thus, our reversal of the judgment on the invasion of privacy by intrusion claims has no effect on the damage awards, since those awards are supported by the verdicts on the remaining claims.

Vacatur of damage awards on First Amendment grounds

Defendants contend that the compensatory and punitive damage awards must be vacated "since one or more of the Quigleys' claims upon which the jury found liability was improperly submitted to the jury, [having] involved conduct that was, as a matter of law, protected by the First Amendment." Defs' Op. Br. at 58.

We reject this contention for three reasons. First, defendants fail to point to where in the record they raised the issue in the district court. Second, for the reasons outlined above, we conclude the district court's submission of the plaintiffs' claims to the jury did not violate the First Amendment. Finally, as outlined above, the defendants themselves urged the district court, over the objection of the plaintiffs, to utilize a verdict form asking the jury to assess lump-sum compensatory damage awards for the state and federal claims (the jury was asked, however, to assess separate punitive damage awards for the state and federal claims). Further, in doing so, defendants conceded that the compensatory damages on all of the claims were the same. Thus, they are in no position to establish reversible error arising out of the fact that the compensatory damage awards are not divided separately between the claims.

False light invasion of privacy

Prior to trial in this case, the Colorado Court of Appeals held that Colorado law would recognize "false light" claims. *See Bueno v. Denver Publ'g Co.*, 32 P.3d 491 (Colo. Ct. App. 2000). Shortly before we heard oral argument in this appeal, however, the Colorado Supreme Court

reversed that decision and "joined those jurisdictions that do not recognize false light as a viable invasion of privacy tort." *Denver Publ'g,* 54 P.3d at 894. In light of the Colorado Supreme Court's decision, we must set aside the judgment of the district court on plaintiffs' "false light" claims. For the reasons outlined above in our discussion of the invasion of privacy by intrusion claims, our action in this regard does not require a remand nor does it have any effect on the damage awards that are part of the judgment.

CONCLUSION

We REVERSE the judgment of the district court with regard to plaintiffs' invasion of privacy by intrusion and false light invasion of privacy claims. Our reversal of these judgments does not have any effect upon the damage awards. We AFFIRM the judgment of the district court in all other respects.

CONCUR BY: Hartz

DISSENT BY: Hartz

DISSENT:

HARTZ, Circuit Judge, concurring in part and dissenting in part:

I join in much of the majority opinion: (1) reversal of the judgment on plaintiffs' claims for invasion of privacy by intrusion and false light invasion of privacy; (2) rejection of defendants' invocation of the fair-report privilege; (3) affirmance of the judgment for compensatory damages under the federal wiretap act based on plaintiffs' unchallenged conspiracy theory (making it unnecessary, in my

view, to determine whether defendants adequately preserved a claim that the agency instructions failed to inform the jury properly regarding the element of control); and (4) rejection of defendants' First Amendment argument predicated on *Bartnicki v. Vopper*, 532 U.S. 514, 149 L. Ed. 2d 787, 121 S. Ct. 1753 (2001).

I respectfully dissent, however, on two issues. First, I believe that defendants' allegations regarding plaintiffs touched on a matter of public concern. Therefore, the jury could award damages for defamation only if it found that defendants had acted with malice. Because the jury was not instructed that it had to find malice, the defamation verdict must be reversed. Reversal of the defamation verdict would leave no state-law cause of action, so state-law punitive damages would also need to be set aside. The defamation claim could, however, be retried.

Second, I would reverse the punitive-damages award against the ADL on the federal wiretap claim. Although the ADL has not preserved its most compelling grounds for reversal of the award (the insufficiency of the evidence to support punitive damages and the improper instruction regarding what the jury must find before imposing such damages), it is still entitled to relief because of an improper instruction stating that it was presumed to know the law contained in the federal wiretap act.

1. Defamation

My ground for departure from the other members of the panel on the defamation claim is that I believe defendants' allegations against plaintiffs touched on a matter of public concern. I do, however, agree with the majority opinion on our starting point for the public-concern analysis:

"Unfortunately, Colorado law provides no clear set of guidelines for determining whether a matter is of 'public concern.'" Maj. Op. at 26. The Colorado courts have issued only a few decisions on the subject, and none involved facts closely analogous to those presented in this case. Reasonable people can therefore differ on how to apply Colorado law here. I do not believe that the majority opinion unreasonably construes Colorado law. Nevertheless, I think it is in error.

To begin with, it is essential to keep in mind that in determining whether allegedly defamatory statements are matters of public concern, a court must assume the statements to be true. If only true statements could be matters of public concern, Colorado's public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action. *See Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1341 (Colo. 1988); Restatement (Second) of Torts § 558 (1977).

Assuming, then, the truth of defendants' allegations, the question before us is whether it is a matter of public concern that residents of an upscale neighborhood have conspired to engage in violence and intimidation to remove a family from the neighborhood because of the family's religious heritage. I acknowledge that the allegations do not concern the exercise of governmental power. Nor would the alleged conspiracy affect many people directly. Indeed, the allegations would be unlikely even to engender personal fear in most people; after all, Jews constitute a small minority of the population.

Nevertheless, as noted by the majority opinion, "the determination of whether . . . speech touches a matter of public concern rests on a particularized examination of

each statement to determine whether it can be fairly considered as relating to any matter of political, *social,* or other concern to the community." Maj. Op. at 26-27 (quoting *Barrett v. Univ. of Colo. Health Sci. Ctr.,* 851 P.2d 258, 263 (Colo. Ct. App. 1993)) (emphasis added). Thus, a purely social concern can be a matter of public concern. I would have thought that *the* social concern of our day is bigotry. Surely, faith-based intolerance, particularly when combined with threats of violence, is a matter of concern to the community at large. Our recognition of Martin Luther King's birthday as a national holiday is intended to underscore this country's commitment to end bigotry, private as well as official. Accounts of private acts of bigotry, from the schools to the office to baseball fields, can regularly be found in the media. After the tragedy of September 11, incidents of private violence against Muslims garnered front page headlines and prompted a speech by the President. In this case itself, the *Denver Post* and *Rocky Mountain News* each published a story about the complaint filed against plaintiffs *before* defendants conducted a press conference.

Interestingly, plaintiffs apparently accept the characterization of faith-based bigotry as a matter of public concern. In their Answer Brief they write:

> Surely, ADL contends, a plaintiff's conspiratorial plan to harm persons of a particular religious faith and drive them from the neighborhood, all as furthered by the performance of criminal acts, is a matter of public concern.
>
> The Quigleys do not disagree with that proposition in the abstract. The problem for ADL's position is that none of this was true.

Ans. Br. at 30. Because I disagree with the suggestion that application of Colorado's public-concern doctrine depends on the truthfulness of the allegedly defamatory statements, I think plaintiffs have conceded the real issue before the court.

In any event, regardless of whether plaintiffs have conceded the issue, I believe that Colorado law required plaintiffs to prove that defendants' defamatory statements were uttered with malice – that is, with knowledge or reckless disregard of the statements' falsity. Because the jury was not so instructed, judgment on the defamation claim, for both compensatory and punitive damages, must be set aside and the matter remanded for further proceedings.

2. Punitive Damages[1]

The federal wiretap act authorizes awards of punitive damages. It does not, however, describe the circumstances

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[1] I should mention a peculiarity of the jury's punitive-damage awards. The federal-law punitive award was much higher than the state-law punitive award. My first reaction to this discrepancy was that the jury must have been particularly offended by the act that violated federal law – the interception of plaintiffs' telephone calls. But there is a more likely explanation. Under Colorado law an award of punitive damages cannot exceed the award of compensatory damages. Colo. Rev. Stat. Ann. § 13-21-102. The sum of the jury's state-law punitive awards (against both defendants, in favor of both plaintiffs) equals the sum of the compensatory awards (although the jury gave Mrs. Quigley a punitive award that exceeded her compensatory award while giving Mr. Quigley a punitive award less than his compensatory award). It seems reasonable to conclude that the jury would have awarded the same amount of punitive damages on the state-law claim as on the federal-law claim if state law had allowed a higher award.

in which such awards are permissible. Nevertheless, the standard for granting an award is reasonably clear.

In *Kolstad v. American Dental Association,* 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999), the Supreme Court interpreted the Civil Rights Act of 1991, which authorized punitive damages for intentional violations of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, when committed "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Court held that "the terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." Punitive damages were therefore available under the statute only if the violator "*knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.*" 527 U.S. at 537 (internal quotation marks omitted; emphasis added).

The federal wiretap act does not include language identical to, or even comparable to, the language of the Civil Rights Act of 1991 setting forth the conditions for imposing punitive damages. All it says is that relief under the act may include "punitive damages in appropriate cases." 18 U.S.C. § 2520(b)(2). Still, the gist of the Civil Rights Act language is implicitly incorporated. First, the "with malice or with reckless indifference" language is a typical formulation of the scienter requirement for punitive damages. There are a number of other formulations, but their meanings are essentially the same. *See Smith v. Wade,* 461 U.S. 30, 46-48, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983). Second, the requirement that the wrongful scienter be directed at "the federally protected rights of an aggrieved

individual" is a natural consequence of the remedy's being afforded under a federal statute. The purpose of authorizing punitive damages under the federal wiretap act is to protect the rights created by that act. It would be rather remarkable if Congress intended the punitive-damages provision of the act to authorize punitive damages for, say, malicious violation of some state-law right not otherwise protected by the act.

Thus, it is safe to say that punitive damages under the federal wiretap act are to be awarded only for violations of the act committed "with malice or reckless indifference to the federally protected rights of an aggrieved individual." As support for this proposition, I note that several of our sister circuits have interpreted the Fair Housing Act, 42 U.S.C. § 3613(c)(1), which, like the federal wiretap act, authorizes punitive damages without describing when they can be awarded, as requiring that the defendants "acted with malice or reckless indifference that their actions might violate a federal statute of which they were aware." *Badami v. Flood,* 214 F.3d 994, 998 (8th Cir. 2000); *accord Preferred Properties v. Indian River Estates,* 276 F.3d 790, 799-800 (6th Cir. 2002); *see Alexander v. Riga,* 208 F.3d 419, 430-32 (3d. Cir. 2000); *Tyus v. Urban Search Mgmt.,* 102 F.3d 256, 266 (7th Cir. 1996).

Accordingly, to award punitive damages against the ADL in this case, the jury would have to find that the ADL "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [federal wiretap act]." *Kolstad,* 527 U.S. at 537.

I do not see how the jury, if properly instructed, could have made such a finding. As the majority opinion sets forth, the attorneys upon whom the ADL was relying

researched the law in late October 1994 and determined (correctly) that interception of plaintiffs' conversations did not violate the federal wiretap act. These attorneys even contacted two state prosecutors who confirmed this conclusion. The problem here is that the law had changed (because of an immediately effective statutory amendment) by early December, less than six weeks later, when the complaint was filed and the press conference conducted.

The majority opinion seems to suggest that the ADL should have rechecked the law in early December. Perhaps it is good practice to recheck the law periodically (although clients may be unwilling to pay for its being done too often). Yet I doubt that it would even be negligence, much less reckless indifference, not to recheck the law every few weeks. Here, the statutory amendment would not have been readily available in a printed codification by the time of the press conference. If lawyers are supposed to discover and apply the law within a few weeks of the law's enactment, then why don't new rules of procedure take effect immediately upon adoption, instead of giving the bar a few months to absorb the change? Quite recently this court was called upon to decide how thoroughly a criminal defense attorney should research a statute. The client had been prosecuted with evidence obtained through a wiretap purportedly authorized by Wyoming law. Our opinion held that the attorney had not provided ineffective assistance of counsel by failing to discover that the Wyoming wiretap statute had expired under a sunset provision more than three years before the surveillance in question. The court wrote, "We doubt that prevailing professional norms require a review of all session laws implicated in a prosecution." *United States v. Salazar,* 323 F.3d 852, 2003 U.S.

App. LEXIS 5823 at 11 (10th Cir. Mar. 26, 2003). I question whether it would have been significantly more difficult for the Wyoming defense attorney (whose client's liberty was at stake) to find the Wyoming session law than for the ADL's attorneys to find the just-enacted amendment to the federal wiretap act.

The majority opinion also suggests that the ADL could be found to have the scienter requisite for punitive damages because there is no evidence that its attorneys "researched or even considered" the legality of using the recorded conversations. Maj. Op. at 49 n.15. But if, as the attorneys found to be true before the October 25 amendment, the wiretap statute did not cover interceptions of cordless-phone conversations, it was a natural – indeed a compelling – inference that the statute also did not prohibit the *use* of such interceptions. (In fact, the only "use" of unlawfully intercepted communications that is barred by the wiretap act is use by one who knows or has reason to know that the interceptions violated the act. 18 U.S.C. § 2511(1)(d).)

In any event, even if there was negligence here in not discovering the new law, I do not see how the ADL's violation of the wiretap act could be characterized as knowing or recklessly indifferent. *Cf. Trans World Airlines v. Thurston,* 469 U.S. 111, 128-30, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) (airline attorneys' overlooking statutory violation in its transfer policy was not conduct in reckless disregard of the statute). The ADL may have done many other things wrong, such as not checking the accuracy of its allegations. But those misdeeds are irrelevant to the availability of punitive damages under the federal wiretap act unless the ADL knew or acted in reckless disregard of whether the act was being violated.

Having said all this, I nonetheless would not set aside the award of punitive damages on the ground of insufficient evidence. By failing to move at the close of evidence for judgment as a matter of law on the claim for punitive damages, the ADL did not properly preserve the issue below. Even if a defendant moves for a directed verdict at the close of the plaintiff's case, the defendant must renew the motion at the close of all evidence (but before the jury returns a verdict) to preserve the issue for appeal. *See Dilley v. SuperValu, Inc.*, 296 F.3d 958, 962 (10th Cir. 2002). (And I should add that I doubt that the ADL's post-verdict motion for judgment adequately raised the specific evidentiary failure that I have been addressing.)

This is not a mere technical requirement. If such a motion has merit, and the trial judge decides to grant it, the plaintiff, having had its attention directed to the gap in its evidence, may request the opportunity to reopen the evidence to fill the gap. That opportunity is lost if the motion is raised only after the verdict is rendered. For this reason, I would be extraordinarily reluctant to review the sufficiency of the evidence under a plain-error standard. We cannot know on appeal what evidence the plaintiff might have offered at trial if it had been shown the necessity of doing so. Although this circuit on occasion has conducted plain-error review of the sufficiency of the evidence in civil cases, *see, e.g., Dilley*, 296 F.3d at 962-63; *Curtis v. Okla. City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1220 (10th Cir. 1998), I am not aware of such review ever having resulted in a reversal.

Of course, regardless of whether we can reverse the judgment on the ground of insufficiency of the evidence, the judgment may be challenged on the ground that the jury was not properly instructed. Indeed, I suspect that

the jury awarded punitive damages under the federal wiretap act only because of erroneous instructions.

The jury was not instructed that it had to find that the ADL acted with knowledge or reckless disregard of whether it was violating the federal wiretap act. The punitive-damages instruction required the jury to find that the ADL's conduct was "wanton and reckless," "reflected utter disregard for the potential consequences . . . on the safety and rights of others," and was "especially shocking and offensive." Such conduct would be egregious, but not necessarily founded on a knowing or reckless disregard of the federal wiretap act.

As noted by the majority opinion, the ADL did not object to the punitive-damages instruction. Nevertheless, in this instance the ADL's failure to object is not fatal. Early in the conference regarding jury instructions, the following exchange occurred:

> **Counsel for plaintiffs:** Just a procedural question. Would you prefer that we hold our objections to the Court's instructions until after the Court has gone through –
>
> **Court:** No. I'm going to assume you guys object to everything in the world, and I'll state that for the record. I'm assuming you're objecting to everything that I do.

Aplt. App. at 4841. Given this comment by the judge, the ADL did not need to object to an instruction in order to preserve the matter for appeal. *See United States v. Harrison,* 296 F.3d 994, 1002 (10th Cir. 2002) (defendant did not need to object in order to preserve issue, because court had indicated that it did not wish to hear further argument on the matter). The ADL cannot be accused of

sandbagging here. Not only did it not indicate approval of the punitive-damages instruction, but it also had gone so far as to proffer an instruction that good faith was a complete defense to all federal-wiretap-act claims.

Remarkably, however, on appeal the ADL has not challenged the punitive-damages instruction. Therefore, I would not reverse on this ground.

Of the two challenges to the instructions that the ADL actually made on appeal, one can be swiftly dealt with. The ADL complains of the district court's rejection of its proffered good-faith-defense instruction. But the proffered instruction was addressed to compensatory as well as punitive damages, misstated the law, and was properly rejected.

The other challenge is to the following instruction given by the court:

> Whether the defendant, the Anti-Defamation League, knew that the interception of the Quigleys' private telephone conversations or the use of those conversations was illegal is irrelevant to your consideration of liability upon the claims for violation of the Federal Wiretap Act. *Defendant is presumed to know the law, including the requirements of the Federal Wiretap Act.*

Aplt. App. at 5043 (emphasis added).[2] Given this quoted instruction, the ADL's violation of the federal wiretap act

[2] The district court next said, "I will now turn to the subject of damages," and discussed in turn the three types of damages (nominal, compensatory, and punitive) at issue with respect to plaintiffs' various causes of action. *Id.* At the outset of the discussion of punitive damages, the court said that the matter "is complicated, because the standards

(Continued on following page)

was presumed to be knowing. Contrary to the implication of the majority opinion, the trial court did not tell the jury that the presumption of knowledge was rebuttable. Instead, the first quoted sentence tells the jury to disregard any evidence concerning actual knowledge of the law. No further instruction told the jury to ignore the quoted instruction when considering punitive damages. If we presume that juries follow the court's instructions, the jury must have obeyed the quoted instruction.

Of course, the ADL did not object at trial to this instruction. But, as previously discussed with respect to the punitive-damages instruction, this failure is not fatal, given the district court's statement that it would assume that counsel were objecting to all instructions.

The only question left, then, is whether the erroneous instruction requires reversal. I am far from certain that the instruction influenced the verdict. My review of the record suggests that the jury's sense of outrage was based on the rush to publicize unsubstantiated accusations of despicable conduct, not the violation of the wiretap act. Nevertheless, I do not think that this error can be held to be harmless. The instruction could well have influenced the jury's decision whether to award punitive damages, as well as the amount of the award. Accordingly, I would reverse the award of punitive damages on this ground.

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are different depending on what claim you are considering." *Id.* at 5045. Among the differences between state and federal punitive damage standards are the Colorado cap on such damages (*see, supra,* n.1) and the Colorado requirement of proof beyond a reasonable doubt.

WILLIAM QUIGLEY and DOROTHY QUIGLEY a/k/a DEE QUIGLEY, Plaintiffs, v. SAUL F. ROSENTHAL, in his individual capacity and in his capacity as representative of the Anti-Defamation League, and the ANTI-DEFAMATION LEAGUE, Defendants.

Civil Action No. 94 N 2782 (Consolidated with Civil Action No. 95 N 2916 for all purposes)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

43 F. Supp. 2d 1163; 1999 U.S. Dist. LEXIS 2768

March 1, 1999, Decided

March 1, 1999, Filed

COUNSEL:

For Quigleys: Jay S. Horowitz, Esq., Philip L. Gordon, Esq., KRENDL, HOROWITZ & KRENDL, Denver, CO.

For Rosenthal, The Anti-Defamation League: David B. Higgins, Esq., Joseph C. Jaudon, Esq., Richard T. D'Ambrosio, Esq., LONG & JAUDON, Denver, CO.

JUDGES:

EDWARD W. NOTTINGHAM, United States District Judge.

OPINION BY:

EDWARD W. NOTTINGHAM

OPINION:

ORDER AND MEMORANDUM OF DECISION

This is a defamation and wiretap case. Plaintiffs William and Dorothy Quigley allege that Defendants the Anti-Defamation League ("ADL") and Saul F. Rosenthal, in his individual and representative capacity, conducted a

campaign of defamation against them in order to falsely portray the Quigleys as anti-Semites. The Quigleys raise twenty-nine claims against defendants, alleging that defendants caused Mitchell and Candice Aronson[1] to intercept the Quigley family's private telephone conversations and then used those recorded conversations to publicly depict the Quigleys as anti-Semitic. Specifically, the Quigleys allege that defendants: (1) violated the Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by the Electronic Communications Privacy Act of 1986 and the Communications Assistance for Law Enforcement Act of 1994, 18 U.S.C.A. §§ 2510-22 (West 1970 & Supp. 1998) [hereinafter "Federal Wiretap Act"]; (2) deprived them of their right to be free from impermissible wiretapping under 42 U.S.C.A. § 1983 (West 1994 & Supp. 1998) [hereinafter "section 1983"]; (3) defamed and conspired to defame them; (4) invaded their privacy; (5) conducted themselves outrageously; (6) maliciously prosecuted them; (7) abused the judicial process; and (8) intentionally interfered with Mr. Quigley's prospective employment opportunities. The matter is before the court on: (1) "Anti-Defamation League and Saul F. Rosenthal's Motion for Reconsideration of the Court's Ruling that ADL and Rosenthal are not Journalists or Motion for Protective Order and Request for Oral Argument" filed August 3, 1998; (2) "ADL and Rosenthal's Motion for Summary Judgment re: First Amendment" filed August 12, 1998; (3)

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[1] The court recognizes that since the events underlying this lawsuit occurred, the Aronsons have divorced, and Mrs. Aronson has resumed the use of her maiden name, Ross. For the sake of clarity and because Ross used the name Aronson during the events described herein, this order refers to her by the name Aronson throughout.

"ADL and Rosenthal's Motion for Summary Judgment re: Agency" filed August 12, 1998; and (4) "ADL and Rosenthal's Motion for Summary Judgment re: Claims for Violation of Constitutional Rights" filed August 12, 1998. Jurisdiction is based on 28 U.S.C.A. §§ 1331, 1343(a)(1), and 1367 (West 1993).

FACTS

In August 1994, the Aronsons moved into a house at 1724 Prima Lane in Evergreen, Colorado. (The Quigleys' Resps. to ADL's and Rosenthal's Statements of Undisputed Material Facts and the Quigleys' Statement of Additional Undisputed Facts – Portions of Pls.' Combined Mem. in Opp'n to Defs. ADL's and Rosenthal's Several Mots. for Summ. J., Statement of Additional Disputed Facts ¶ 8 [filed Oct. 6, 1998] [hereinafter "Pls.' Resp. Facts"].) The Quigleys lived two houses down the street from the Aronsons. (*Id.*, Statement of Additional Disputed Facts ¶ 19.) Starting in the fall of 1994, the two families appear to have developed an enmity which has since spawned extensive litigation involving multiple parties.

According to the Aronsons, the Quigleys did not want them to live in the neighborhood because they are Jewish. (Verified Compl. for Injunctive Relief, Damages[,] and Jury Demand ¶¶ 3-4 [filed Dec. 6, 1994] [hereinafter "Aronsons' Compl."].) The Aronsons maintain that, starting shortly after they moved into their new home, the Quigleys conspired to harass and intimidate them so as to force them to leave the neighborhood. (*See id.* ¶ 3.) At some point in the late summer or early fall of 1994, the Aronsons began using a police scanner to intercept and then tape record the Quigleys' telephone conversations with

third parties. (ADL and Rosenthal's Mem. Br. in Supp. Mot. [sic] for Summ. J. re: Claim of Violation of Quigleys' Constitutional Rights, Statement of Undisputed Material Facts ¶ 5 [filed Aug. 12, 1998] [hereinafter "Defs.' Constitutional Br."]; *admitted in pertinent part at* Pls.' Resp. Facts, The Quigleys' Resp. to Statement of Undisputed Material Facts in Mot. for Summ. J. re: Claim of Violation of Quigleys' Constitutional Rights ¶ 5.) Based in large part on the content of these intercepted telephone conversations, the Aronsons alleged that the Quigleys made anti-Semitic comments about them and their children. (*Id.*, Statement of Undisputed Material Facts ¶ 3; *admitted in pertinent part at* Pls.' Resp. Facts, The Quigleys' Resp. to Statement of Undisputed Material Facts in Mot. for Summ. J. re: Claim of Violation of Quigleys' Constitutional Rights ¶ 3.)

On October 21, 1994, Mr. Aronson made his initial contact with the ADL, when he reported to Barbara Towbin, senior associate director of ADL's Mountain States regional office, that the Quigleys were harassing him and Mrs. Aronson because they are Jewish. (Pls.' Resp. Facts, Statement of Additional Disputed Facts ¶ 44.) Between October 21 and December 7, 1994, the Aronsons continued to intercept and record the Quigleys' phone conversations, and they spoke to Towbin on an almost daily basis, purporting to inform the ADL about the "campaign of harassment" which the Quigleys were waging against them. (*Id.*, Statement of Additional Disputed Facts ¶ 44; *admitted at* ADL and Rosenthal's Reply Br. in Supp. of Their Mot. for Summ. J. re: First Amendment, Reply Concerning Undisputed Facts ¶ 55 [filed Dec. 4, 1998] [hereinafter "Defs.' First Amendment Reply"].) Towbin referred the Aronsons to attorney Gary Lozow, who, in turn, brought in another

lawyer, Stewart Kritzer, to meet with the Aronsons and other ADL representatives. (ADL and Rosenthal's Mot. for Summ. J. re: First Amendment, Statement of Undisputed Material Facts ¶ 5 [filed Aug. 12, 1998] [hereinafter "Defs.' First Amendment Br."]; *admitted in pertinent part at* Pls.' Resp. Facts, The Quigleys' Resp. to Statement of Undisputed Material Facts in Mot. for Summ. J. re: First Amendment ¶ 5.)

On December 6, 1994, the Aronsons filed a complaint in this court against the Quigleys in Civil Action No. 94-N-2782, alleging ethnic intimidation and violation of their civil rights (the "civil-rights action"). (Defs.' Constitutional Br., Statement of Undisputed Material Facts ¶ 1; *admitted in pertinent part at* Pls.' Resp. Facts, The Quigleys' Resp. to Statement of Undisputed Material Facts in Mot. for Summ. J. re: Claim of Violation of Quigleys' Constitutional Rights ¶ 1; *see also* Aronsons' Compl.) Kritzer and Lozow represented the Aronsons in the civil-rights action. The Aronsons' complaint consisted almost entirely of references to excerpts from the intercepted telephone conversations of the Quigleys. (Pls.' Resp. Facts, Statement of Additional Disputed Facts ¶ 90; *admitted at* Defs.' First Amendment Reply, Reply Concerning Undisputed Facts ¶ 90.) On December 20, 1994, the Aronsons amended their complaint. (Verified [First] Am. Compl. for Injunctive Relief, Damages[,] and Jury Demand ¶¶ 2-3 [filed Dec. 20, 1994] [hereinafter "Aronsons' Am. Compl."].)

On December 6, 1994, after the civil-rights action had been filed, *Denver Post* reporter Peter Chronis contacted Rosenthal and asked his opinion about the civil-rights action. (Defs.' First Amendment Br., Statement of Undisputed Material Facts ¶ 8; *admitted at* Pls.' Resp. Facts, The Quigleys' Resp. to Statement of Undisputed Material

Facts in Mot. for Summ. J. re: First Amendment ¶ 8.) Later that same day, Rosenthal, Towbin, Kritzer, and the Aronsons met to discuss a strategy for dealing with the press. (Pls.' Resp. Facts, Statement of Additional Disputed Facts ¶ 95.) Subsequent to that meeting, the ADL issued a "Press Advisory" announcing a December 7, 1994, press conference "to present information about a major case of anti-Semitism and harassment in the Evergreen, Colorado area and the lawsuit which has resulted from that case." (*Id.*, Attach., Ex. KK [Press Advisory].) At that press conference, Rosenthal read a prepared "Opening Statement" and fielded questions from members of the media. (*Id.*, Attach., Ex. MM [Opening Statement].) Rosenthal's comments were extensively quoted in the media, and, on December 7, 1994, Rosenthal was interviewed on Denver radio station KOA about the civil-rights action. (*Id.*, Statement of Additional Disputed Facts ¶ 122.) On December 9, 1994, the Jefferson County District Attorney's Office publicly announced that it was charging the Quigleys with the crime of ethnic intimidation. (*Id.*, Attach., Ex. BB [Paulter Dep. at 36].)

In January 1995, the Quigleys filed their answer to the Aronsons' amended complaint, denying that they conspired to intimidate the Aronsons or violate the Aronsons' rights. (Answer of Defs. [ ] to Pls.' Verified First Am. Compl. and [the Quigleys'] First Am. Countercls. Against [the Aronsons], Saul F. Rosenthal, and the [ADL] at 2 [filed Jan. 17, 1995].) The Quigleys maintained that, for reasons unknown to them, the Aronsons loathed them and engaged in a campaign of tortious and unlawful conduct against them. (*Id.* at 10.) According to the Quigleys, after enlisting the assistance of Rosenthal, the ADL, and "a transcription service" (later named as Defendant Legal-Temp., Inc., doing business as Attorneys Service Center,

Inc. ["Legal-Temp"]), the Aronsons illegally intercepted the Quigleys' private conversations, transcribed them, and edited them so as to falsely portray the Quigleys as anti-Semitic. (*Id.* at 19-24.) Thereafter, according to the Quigleys, the Aronsons, together with Rosenthal and the ADL, conducted a press conference wherein they publicly labeled the Quigleys anti-Semitic and accused them of planning vicious acts against the Aronsons. (*Id.* at 25-29.) In their amended counterclaims, the Quigleys asserted state-law tort counterclaims against the Aronsons, Rosenthal, and the ADL.

In addition, Mr. Quigley, on January 17, 1996, filed an amended complaint in a separate suit against the Aronsons, Civil Action No. 95-N-2916. (Pl. William J. Quigley's Am. Compl. and Demand for a Jury Trial [deemed filed Jan. 17, 1996].) Mr. Quigley claimed that the Aronsons, Rosenthal, the ADL, Kritzer, Lozow, and Legal-Temp violated his rights under the Federal Wiretap Act by intercepting his and his family's private telephone conversations ("the wiretap action"). (*Id.*) On February 10, 1997, I granted a motion to consolidate the civil-rights action (94-N-2782) with the wiretap action (95-N-2916). (Order [filed Feb. 10, 1997].)

On April 7, 1997, the Aronsons filed a case against Kritzer in Jefferson County District Court, alleging that he had acted negligently and breached his fiduciary duties to them in regard to the civil-rights action. (Pls.' Resp. Facts, Attach., Ex. EE [Verified Compl. and Jury Demand, Case No. 97-CV-0902 (filed in Jefferson County District Court, Apr. 7, 1997)].) On February 20, 1998, Kritzer, Lozow, the Aronsons, and the Quigleys reached a settlement agreement whereby Kritzer and Lozow paid monies to the Quigleys and the Aronsons, and all parties to the

settlement agreed to release each other from liability for all federal and state civil claims between them ("the settlement"). (Pls.' Resp. Facts, Attach., Ex. EEE [Settlement Agreement and Mutual Release].)

The settlement, however, did not incorporate the Quigleys' claims against the ADL, Rosenthal, or Legal-Temp. On May 28, 1998, I deemed filed the Quigleys' consolidated complaint, which alleged thirty-one claims against Rosenthal, the ADL, and Legal-Temp. (Pls. William Quigley's and Dorothy Quigley's Consolidated Compl. and Demand for a Jury Trial [filed May 28, 1998] [hereinafter "Consolidated Compl."].) On November 4, 1998, I ordered the dismissal of Legal-Temp on the basis of the parties' stipulation to that effect. (Order of Dismissal with Prejudice [filed Nov. 4, 1998].)

In the context of this on-going litigation, the parties have engaged in numerous discovery disputes. At issue in this order, in addition to the dispositive motions outlined below, is defendants' motion seeking reconsideration of my order granting the Quigleys' motion to compel responses to their sixth request for production in their second set of interrogatories ("sixth request"). (Anti-Defamation League and Saul F. Rosenthal's Mot. for Recons. of the Ct.'s Ruling that ADL and Rosenthal are not Journalists or Mot. for Protective Order and Req. for Oral Argument [filed Aug. 3, 1998] .)

On August 12, 1998, defendants filed three motions for summary judgment on claims alleged by the Quigleys. First, defendants contend that several of the Quigleys' claims against them are impermissibly based upon speech protected under the First Amendment to both the Colorado and United States Constitutions. (ADL and Rosenthal's

Mot. for Summ. J. re: First Amendment [filed Aug. 12, 1998].) Second, defendants argue that they may not be held liable for the acts of Kritzer and Lozow because Kritzer and Lozow were not acting as defendants' agents. (ADL and Rosenthal's Mot. for Summ. J. re: Agency [filed Aug. 12, 1998].) Finally, defendants assert that they may not be held liable for violating the Quigleys' constitutional rights because any wiretapping which occurred was not prohibited by law during the relevant period, and the Aronsons, who intercepted the Quigleys telephone conversations, were not state actors. (ADL and Rosenthal's Mot. for Summ. J. re: Claims for Violation of Constitutional Rights [filed Aug. 12, 1998].)

ANALYSIS

1. Motion for Reconsideration

a. Rule 60(b)

Although the Federal Rules of Civil Procedure do not specifically allow for a motion for reconsideration, the court treats such a motion in one of two ways, depending upon when the motion is filed. *Hatfield v. Board of County Comm'rs for Converse County,* 52 F.3d 858, 861 (10th Cir. 1995); *Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir. 1991). The court considers a motion for reconsideration filed within ten days of the entry of judgment as one to alter or amend the judgment under rule 59(e) of the Federal Rules of Civil Procedure. *Hatfield,* 52 F.3d at 861. The court construes such a motion filed more than ten days after entry of judgment as one seeking relief from the judgment under rule 60(b) of the Federal Rules of Civil Procedure. *Id.* In addition, while rule 59 refers only to motions to alter or amend judgments which have already

been entered, rule 60(b) allows a court to "relieve a party . . . from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b). Because defendants seek reconsideration of an order, not a final judgment, I consider their motion under rule 60(b).

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may relieve a party from an order "upon such terms as are just." *Id.* The rule enumerates six grounds for granting such a motion: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct; (4) void judgment; (5) satisfied or no longer equitable judgment; or (6) any other reasons justifying such relief. *Id.* A court "has substantial discretion in connection with a rule 60(b) motion," *Pelican Prod. Corp. v. Marino,* 893 F.2d 1143, 1146 (10th Cir. 1990), and the rule "gives the court a grand reservoir of equitable power to do justice in a particular case," *In re Gledhill,* 76 F.3d 1070, 1080 (10th Cir. 1996) (quoting *Pierce v. Cook & Co.,* 518 F.2d 720, 722 [10th Cir. 1975] [en banc] [internal quotations and citations omitted]). Defendants ask me to reconsider my oral order granting the Quigleys' motion to compel responses to their sixth request in their second set of interrogatories and requests for production of documents. (Courtroom Mins. [July 23, 1998].)

The sixth request asked Rosenthal to produce all documents "concerning, referring, or relating to all complaints of anti-Semitism made to ADL's Mountain States office since January 1, 1990." (Pls.' Mot. to Compel Resp. to Pls. William Quigley's and Dorothy Quigley's Second Set of Interrogs. and Reqs. for Produc. of Docs. to Def. Saul F. Rosenthal, Ex. B [Def. Saul F. Rosenthal's Resps. to Pls. William J. Quigley's and Dorothy "Dee" Quigley's Second

Set of Interrogs. and Reqs. for Produc. of Docs at 12 (hereinafter "Def.'s Resp. to Interrogs.")] [filed July 2, 1998].) Rosenthal objected to the sixth request on the grounds that the information sought was protected under the newsperson privilege and was, further, overbroad, overly burdensome, and oppressive. (*Id.*, Ex. B [Def.'s Resp. to Interrogs at 12].) At a hearing regarding the Quigleys' motion to compel on July 23, 1998, I granted the motion with respect to, *inter alia*, the sixth request, on the grounds that defendants' *ipse dixit* assertion that ADL is a journalistic organization was insufficient to allow the privilege. (Tr. of Hr'g at 12-13 [July 23, 1998].) Defendants now reassert the argument that the ADL may be considered a journalistic organization for purposes of the privilege and that it need not produce the requested materials under the First Amendment to the United States Constitution and Colorado's journalists' privilege and shield law, Colorado Revised Statute § 13-90-119 (1998).

b. Rule 501

The Quigleys contend that, under rule 501 of the Federal Rule of Evidence, I must apply Colorado law to defendants' claim of privilege. Rule 501 provides that, when a federal court hears a civil action, "with respect to an element of a claim . . . as to which State law provides the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." Fed. R. Evid. 501; *see also Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993) (applying California law pursuant to rule 501). Because the Quigleys claim that this evidence is relevant to demonstrate (1) the falsity of Rosenthal's statements and (2) "actual malice," or defendants' knowledge of that falsity, both state-law-defined

elements of the Quigleys' defamation claims, I evaluate the claim of privilege under Colorado law. (Pls.' Opp'n to Defs. the Anti-Defamation League's and Saul F. Rosenthal's Mot. for Recons. of this Ct.'s Ruling that ADL and Rosenthal Are Not Journalists or Mot. for Protective Order at 11 [filed Sept. 2, 1998] [hereinafter "Pls.' Resp. to Mot. to Recons."].)

c. Newsperson Privilege

Colorado Revised Statute § 13-90-119 provides for an evidentiary "privilege for [a] newsperson" except where the party seeking disclosure can demonstrate: "[1] that the news information is directly relevant to a substantial issue involved in the proceeding; [2] that the news information cannot be obtained by any other reasonable means; and [3] that a strong interest . . . outweighs the interests under the First Amendment to the United States Constitution in not responding to a subpoena and of the general public in receiving news information." Colo. Rev. Stat. § 13-90-119(3)(a)-(c). The parties dispute vigorously whether or not ADL may be considered a "newsperson" or "journalist" for purposes of invoking this privilege. Section 13-90-119 defines "Newsperson" as "any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit new information for dissemination to the public through mass media." *Id.* § 13-90-119(3)(a). "Mass medium" is further defined as "any publisher of a newspaper or periodical. . . . " *Id.* § 13-90-119(1)(c). It is undisputed that ADL publishes numerous periodicals, books, and pamphlets and regularly engages in news gathering activities. Therefore, I find that

defendants have met their burden of demonstrating the ADL's status as a "newsperson."

This holding coheres with existing state and federal law. The Colorado Supreme Court in *Henderson v. Colorado,* 879 P.2d 383 (Colo. 1994), held that a witness was "*acting as a 'newsperson'* when he piloted [a] helicopter," used to transport both police officers investigating an alleged criminal and a news photographer. *Id.* at 392 (emphasis supplied). The court reasoned that the witness was a newsperson not simply because he was an employee of a television news station, but also because, during the incident at issue, "he was *acting as a newsperson* as defined by subsection (1)(c) and not as a police agent." *Id.* at 392. Similarly, the Tenth Circuit has held that a documentary filmmaker, even though "he did not regularly engage in obtaining, writing, reviewing, editing[,] or otherwise preparing news," fell under the ambit of the federal common-law journalists' privilege to the extent that his investigative interviews formed the basis for his documentary film. *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433, 436-37 (10th Cir. 1977). The court noted that "the Supreme Court has not limited the privilege to newspaper reporting. It has in fact held that the press comprehends different kinds of publications which communicate to the public information and opinion." *Id.* at 437 (citing *Lovell v. City of Griffin,* 303 U.S. 444, 452, 58 S. Ct. 666, 669, 82 L. Ed. 949 [1935]).

Considering the specific information sought to be withheld in response to the sixth request, I find that defendants are entitled to invoke the privilege with regard to their record of anti-Semitic complaints filed with the Mountain States' Office. Under the first prong of the statutory test, I find that the information which the

Quigleys seek is not directly relevant to a substantial issue in this case. The Quigleys contend that the complaints to the ADL "bear directly upon essential elements of the Quigleys' defamation claims" because they prove the falsity and malice behind two of Rosenthal's allegedly defamatory statements. (Pls.' Resp. to Mot. to Recons. at 8, 10.) According to the Quigleys, Rosenthal announced at the December 7, 1994, press conference that the Quigleys had engaged in conduct which constituted "'one of the most astonishing cases of anti-Semitic harassment [the Mountain States Office] has ever confronted.'" (*Id.* at 10.) The Quigleys also allege that Rosenthal subsequently stated on a radio talk show that the Quigleys' conduct was "'the worst that [Rosenthal had] seen in so many years, since the [Alan] Berg murder.'" (*Id.*)

I fail to see how, even if the Quigleys obtained copies of the complaints requested, they could prove the falsity of these statements of opinion which are, at worst, examples of mere "rhetorical hyperbole." *See Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman,* 55 F.3d 1430, 1438 (9th Cir. 1995) (holding that, because of First Amendment protections, "statements of 'rhetorical hyperbole' [are not] sanctionable. . . . ") (citations omitted). "When the facts underlying a statement of opinion are disclosed, [the audience] will understand that they are getting the [speaker's] interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." *Id.* at 1439 (citations omitted). The context of each of the alleged defamatory statements makes clear the basis for Rosenthal's opinion. The Quigleys themselves allege that Rosenthal's statement that "this has been one of the most astonishing cases of

anti-Semitic harassment our office has ever confronted," was immediately followed with this explanation:

> The consistency and frequency of threats, sustained over months, makes this a very different kind of anti-Semitic incident. Unlike the more typical case of an isolated verbal or physical assault, what we have here are dozens of instances of attempts to intimidate, threaten and do harm to the Aronsons and to conspire with others in the neighborhood to do the same.

(Consolidated Compl. ¶ 39[b].) Similarly, Rosenthal's statement that the conduct was "the worst that [he had] seen in so many years, since the [Alan] Berg murder," lay within the following quotation:

> And, here we are basically a little over ten years later [after the Alan Berg assassination], and it's been the small stuff, you know, a few, a few encounters with Sean Slater and Klu [sic] Klux Klan. . . . But, but this is months of, of effort on the part of the Quigleys to scheme and plot and plan and bring a variety of neighbors into the process and to drive a car at someone to try and frighten them and to nearly crash into them and to talk about dousing their kids and calling the police and, and putting false charges out there that the [Aronsons], that the Aronsons are doing one thing or another that is absolutely false, that's what makes it the worst that I've seen in so many years, since the Berg murder, because it's uh, it's so massive in the number of acts that the Aronsons, uh, that the Quigleys engaged in against the Aronsons.

(*Id.* ¶ 43[e].) Regarding the statement complained of, "it is plain that the speaker is expressing a subjective view, an

interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." *Yagman,* 55 F.3d at 1441. Thus, I find that release of the complaints regarding other incidents of anti-Semitic conduct could not demonstrate the truth or falsity of Rosenthal's assertions, nor could it reveal any actual malice on his part.

The test for exceptions to Colorado's newsperson privilege statute is phrased in the conjunctive. Thus, the Quigley's failure to prove the first prong of the test obviates the need for further analysis. I therefore grant defendants' motion for reconsideration and further hold that defendants need not produce the documents requested under the sixth request.

2. Motions for Summary Judgment: Legal Standard

Under rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Concrete Works, Inc. v. City & County of Denver,* 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material

matter." *Concrete Works, Inc.,* 36 F.3d at 1518 (citing *Celotex Corp.,* 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.,* 477 U.S. at 324, 106 S. Ct. at 2553; *see* Fed. R. Civ. P. 56(e). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co.,* 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.,* 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,* 912 F.2d 1238, 1241 [10th Cir. 1990]).

3. Motion for Summary Judgment: First Amendment

Defendants move for summary judgment in their favor on (1) the defamation claims, (2) the wiretap claims involving disclosure, and (3) the remaining common-law tort claims, arguing that all of these claims are based upon speech protected under the First Amendment to both the Colorado and United States Constitutions. (Defs.' First Amendment Br.) Generally, to prove a cause of action for defamation, a plaintiff must establish: (1) a defamatory statement; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to plaintiff caused by publication. *Williams v. District Court, Second Judicial Dist., City & County of Denver,* 866 P.2d 908, 912 n.4 (Colo. 1993) (en banc) (citations omitted). If the plaintiff in a defamation action is a "public figure," however, the third element of a defamation

claim requires proof that the defendant published the defamatory statement with actual malice, that is, with knowledge of its falsity or in reckless disregard of its truth or falsity. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *see also Lewis v. McGraw-Hill Broad. Co., Inc.,* 832 P.2d 1118, 1122-23 (Colo. Ct. App. 1992) (citing same).

The Supreme Court has left it to the states to decide whether this heightened standard of fault should also be applicable to instances where the allegedly defamatory statement relates not to a public figure, but to a private figure involved in a matter of "public concern." "So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 347, 94 S. Ct. 2997, 3010, 41 L. Ed. 2d 789 (1974). Colorado has chosen to adopt the Supreme Court's standard of actual malice, including the definition of "reckless disregard" for truth or falsity, for cases involving public officials, public figures, and matters of public or general concern. *Diversified Management, Inc. v. Denver Post, Inc.,* 653 P.2d 1103, 1106 (Colo. 1982) (en banc). Thus, where the plaintiff is a public figure by virtue of his or her involvement in a matter of public concern, i.e., a "limited-purpose public figure," the First Amendment imposes greater protection for the speech of the defendant than it would for a purely private figure. *See Gertz,* 418 U.S. at 351, 94 S. Ct. at 3013 (defining a limited-purpose public figure in contrast to an all-purpose or general public figure).

a. Public Concern Doctrine

The question of whether an individual is a public figure – limited – or all-purpose – and is therefore subject to the actual malice standard is one of law, not fact. Restatement (Second) of Torts § 580A (1977). Here, there is no dispute that the Quigleys are not general purpose public figures. To establish that a defamation or libel plaintiff is a limited-purpose public figure, on the other hand, a defendant bears the burden of showing that:

> (1) public controversy existed on a specific question having ramifications for nonparticipants; (2) the plaintiff had a significant role in the controversy, either by voluntarily attempting to affect the outcome or by being drawn into the controversy and assuming a central role; and (3) the alleged defamation was germane to the plaintiffs participation in the controversy.

Clyburn v. News World Communications, Inc., 705 F. Supp. 635, 639 (D.D.C. 1989), *aff'd*, 284 U.S. App. D.C. 212, 903 F.2d 29 (D.C. Cir. 1990) (citing *Waldbaum v. Fairchild Publications, Inc.*, 201 U.S. App. D.C. 301, 627 F.2d 1287, 1296-98 [D.C. Cir. 1980]).

With regard to the first prong of this standard, it is plain that the subject matter of a defamatory statement must have existed as a public concern prior to any controversy engendered by the allegedly defamatory comments. *Waldbaum,* 627 F.2d at 1297 (citation omitted). Furthermore, "the newsworthiness of an event is not the measuring stick for identifying public controversy" to determine whether those individuals involved may be considered public figures. *Dameron v. Washington Magazine, Inc.*, 250 U.S. App. D.C. 346, 779 F.2d 736, 742 (D.C. Cir. 1985). Thus, because of the broad array of events which may

invoke the interest of the media, courts have made clear that "essentially private concerns or disagreements do not become public controversies simply because they attract attention." *Waldbaum,* 627 F.2d at 1296 (citing *Time, Inc. v. Firestone,* 424 U.S. 448, 454-55, 96 S. Ct. 958, 965-66, 47 L. Ed. 2d 154 [1976]). In this vein, the Supreme Court has stated that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire,* 443 U.S. 111, 135, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979); *see also Diversified Mgmt., Inc.,* 653 P.2d at 1107 (quoting same).

In this case, I find that defendants have not met their burden to demonstrate that the Quigleys were limited-purpose public figures when Rosenthal made the bulk of his allegedly defamatory statements, at the press conference and as an interviewee on KOA radio. Most importantly, it is undisputed that the Quigleys did not "thrust [themselves] or [their] views into public controversy to influence others." *Hutchinson,* 443 U.S. at 135, 99 S. Ct. at 2688. Indeed, the bulk of the allegedly defamatory statements were based on excerpts of private telephone conversations between the Quigleys and other third parties which the Aronsons surreptitiously intercepted. (*See, e.g.,* Pls.' Resp. Facts, Attach., Ex. MM [Opening Statement].) In this regard, the Quigleys' position contrasts to that of the plaintiffs in *Diversified Management, Inc.,* in which the court found that alleged widespread and ongoing land-development schemes of questionable propriety constituted a matter of public concern strictly because the matter still had the potential to affect future buyers of lots which were yet-unsold. *Id.,* 653 P.2d at 1108. Similarly, in *Lewis,* the court found a matter of public interest existed

in part because the plaintiff filed a civil lawsuit to "protest[ ] racially motivated policies of a *large retail establishment* which allegedly had been directed against her." *Id.*, 832 P.2d at 1122 (emphasis supplied). Thus, in *Lewis*, in addition to the fact that the plaintiff had essentially thrust herself into a public debate through her lawyer's public commentary at a local meeting, the court relied on the fact that resolution of the issue could have an affect on other patrons of a commercial entity. *Id.*

At the time of the allegedly defamatory statements in this case, Rosenthal had received merely one unsolicited request from the press based on the filing of the lawsuit, as compared to the "immediate and widespread publicity from the various media organizations" which the filing of the underlying lawsuit in *Lewis* prompted. *Id.*, 832 P.2d at 1120. It was defendants' decision (arguably along with the Aronsons'), not the Quigleys', to amplify the matter by calling a press conference under the ADL name. Because, at the time of the press conference on December 7, 1994 – the original publication of the allegedly defamatory statements – the dispute between the Aronsons and the Quigleys was still essentially private, I conclude that the Quigleys were not public figures subject at that point, and Rosenthal's statements about them are, accordingly, not subject to the higher standard.

My inquiry, however, does not end there. As even the Quigleys acknowledge, at some point, the dispute between the Aronsons and Quigleys became a matter of public concern. (*See* Pls.' Combined Mem. in Opp'n to Defs. ADL's and Rosenthal's Several Mots. for Summ. J. at 14-15 n.6. [filed Oct. 6, 1998] [hereinafter "Pls.' Resp."].) Extensive media coverage of all the subsequent incidents and proceedings involving the Quigleys and Aronsons, as well as

calls of support for the Aronsons from concerned citizens around the state, are a fair measure that eventually, the dispute took on a life of its own and became the sort of issue "about which information is needed or is appropriate." *Lewis,* 832 P.2d at 1121 (citing *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 492, 95 S. Ct. 1029, 1045, 43 L. Ed. 2d 328 [1975]). Admittedly, the moment at which this transformation occurred is difficult to pinpoint. It is plain, in any event, that after the Jefferson County District Attorney's Office *publicly* announced on December 9, 1994, that it was pressing criminal charges against the Quigleys, the dispute was a matter of public interest.

The Supreme Court has articulated that "the commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions [ ] are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broad. Corp.,* 420 U.S. at 492, 95 S. Ct. at 1045. Although the claim in *Cox Broadcasting Corp.* concerned an alleged invasion of privacy rather than a defamation action, the Court's logic in that context is equally applicable here. Thus, with regard to statements made after the district attorney's announcement on December 9, 1994, the Quigleys may be considered private individuals involved in a matter of public interest. Accordingly, any alleged defamation or slander which occurred after that announcement must be evaluated under the actual malice standard. (*See, e.g.,* Consolidated Compl. ¶ 65 [stating that "immediately after the Jefferson County authorities publicly filed their criminal charges against the Quigleys . . . Rosenthal again spoke to the press about the Quigleys. . . .], ¶¶ 70, 76, 82, 86 [alleging that defendants' false accusations "were

disseminated throughout Colorado and nationally and were re-published in the media for months after (defendants) initially disseminated the (Opening Statement)"]). All earlier statements, including those at the press conference and on KOA radio, are analyzed pursuant to the lower, private-figure standard.

b. Privilege Defenses

Defendants argue that, even if they published statements defaming the Quigleys, they should not be held liable for doing so because their statements were (1) protected under the judicial proceedings privilege, and (2) statements of opinion, and therefore not defamatory as a matter of law. (Defs.' First Amendment Br. at 15-18.) I consider each of these arguments in turn.

i. Judicial Proceedings Privilege

According to the Restatement Second of Torts:

> the publication of a defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts § 611 (1977). Defendants argue that "most jurisdictions" have extended the privilege to cover statements made regarding court pleadings, even if they have not yet been the subject of any judicial action. (Defs.' First Amendment Reply at 29-30.) Indeed, although defendants have accurately cited the law with regard to some jurisdictions, *see, e.g.*, *Kurata v. Los Angeles News Publishing Co.*, 4 Cal. App. 2d 224, 40 P.2d 520 (Cal. Ct.

App. 1935); *Johnson v. Johnson Publishing Co.*, 271 A.2d 696 (D.C. 1970); *Newell v. Field Enterprises Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434, 47 Ill. Dec. 429 (Ill. App. Ct. 1980); *Reilly v. Gillen*, 176 N.J. Super. 321, 423 A.2d 311 (N.J. Super. Ct. 1980), defendants have disregarded the law of Colorado. Colorado courts have consistently adhered to the original Restatement rule which precludes a defamation defendant from invoking the judicial proceedings privilege on the basis of a filed complaint alone. *See Towles v. Meador*, 84 Colo. 547, 272 P. 625 (Colo. 1928) (denying qualified privilege based only on initial filing of complaint of fraud); *Switzer v. Anthony*, 71 Colo. 291, 206 P. 391 (Colo. 1922) (noting that publication of a legal proceeding is qualifiedly privileged only after proceeding has gone into court and thereby become public); *Meeker v. Post Printing & Publ'g Co.*, 55 Colo. 355, 135 P. 457 (Colo. 1913) (holding that publication of libelous charges set forth in complaint and affidavits filed in a civil suit before trial or any other action taken on pleadings is not privileged).

Where Colorado Supreme Court precedent on a state-law issue exists, I am bound to follow it. *Fransen v. Conoco, Inc.*, 64 F.3d 1481 (10th Cir. 1995). Because the alleged defamatory statements which Rosenthal made at the press conference and on KOA radio occurred immediately after the Aronsons' complaint was filed and before any judicial action could have been taken thereon, I find that defendants' statements do not fall under this protective shield.

ii. Opinion Privilege

Defendants also argue that they should not be held liable for several of the allegedly defamatory statements because they merely amount to opinion. Indeed, "while false statements of fact and opinions that reasonably imply undisclosed defamatory facts as their premise are actionable, pure opinion is not." *Sall v. Barber,* 782 P.2d 1216, 1218 (Colo. Ct. App. 1989). Because the determination of whether a particular statement is an opinion arises as a matter of law, the Colorado Supreme Court has outlined a three-factor analysis which instructs a court to consider: (1) whether the statement is "cautiously" phrased in terms of "apparency"; (2) how the entire statement, "not just the objectionable word or phrase," appears in context; and (3) what the nature of the circumstances surrounding the statement is, including the medium through which it is published and its audience. *Id.* at 1217 (citing *Burns v. McGraw Hill Broad., Inc.,* 659 P.2d 1351 [Colo. 1983]). In particular, defendants contend that the following statements are not defamatory as a matter of law because they are opinions:

> 1. "This has been one of the most astonishing cases of anti-Semitic harassment our office has ever confronted. The consistency and frequency of threats, sustained over months, makes this a very different kind of anti-Semitic incident. Unlike the more typical case of an isolated verbal or physical assault, what we have here are dozens of instances of attempts to intimidate, threaten and do harm to the Aronsons and to conspire with others in the neighborhood to do the same."
>
> 2. "The Aronson family has lived in fear of the Quigleys these last several months. And for good

reason. [The] Quigley[s] have proven themselves to be dangerous neighbors."

3. "This case, what makes this case particularly unique is the volume of the anti-Semitic activity. . . ."

4. "And, here we are basically a little over ten years later [after the Alan Berg assassination], and it's been the small stuff, you know, a few, a few encounters with Sean Slater and Klu [sic] Klux Klan. . . . But, but this is months of, of effort on the part of the Quigleys to scheme and plot and plan and bring a variety of neighbors into the process and to drive a car at someone to try and frighten them and to nearly crash into them and to talk about dousing their kids and calling the police and, and putting false charges out there that the [Aronsons], that the Aronsons are doing one thing or another that is absolutely false, that's what makes it the worst that I've seen in so many years, since the Berg murder, because it's uh, it's so massive in the number of acts that the Aronsons, uh, that the Quigleys engaged in against the Aronsons."

5. ". . . . it's not a two-sided story. . . . The Aronsons haven't done anything, they simply moved into the house, and within weeks thereafter the Quigleys started this effort to get them thrown out of the neighborhood because they didn't want, as they referred to them, I can't even use the term because it's the 'f' word, those 'f' Jews in their community. And, um, that strikes me as, as one of those quest, questions that doesn't have two sides to it."

(Defs.' First Amendment Br. at 16 [quoting Pls.' Resp. Facts, Attach., Ex. MM (Opening Statement), Ex. SS (Greg Dobbs Program broadcast, Dec. 7, 1995)].)

I have already noted that, in the context of the newsperson's privilege, two of Rosenthal's statements – that the Quigleys had engaged in conduct which constituted "one of the most astonishing cases of anti-Semitic harassment [the Mountain States Office] has ever confronted" and that the Quigleys' conduct was "the worst that [Rosenthal had] seen in so many years, since the [Alan] Berg murder" – were reasonably construed as unactionable statements of opinion, not fact. Other statements, such as "the Aronson family has lived in fear of the Quigleys these last several months. And for good reason. [The] Quigley[s] have proven themselves to be dangerous neighbors," ". . . what makes this case particularly unique is the volume of the anti-Semitic activity . . . ," and ". . . it's not a two-sided story," might also be "reasonably . . . perceived as rhetorical hyperbole rather than fact," *Sall,* 782 P.2d at 1217.

I find, however, that there are some statements even within the defendants' claimed opinions, which may properly be characterized as actionable defamatory allegations. For instance, some of the facts which appear to underlie the statements of opinion in the passages above could be evaluated in terms of their veracity or falsity. Thus, even as Rosenthal offered the opinion in the first passage above that this was "one of the most astonishing cases of anti-Semitic harassment [his] office has ever confronted," he based the opinion in part on the assertion that ". . . what we have here are dozens of instances of attempts to intimidate, threaten and do harm to the Aronsons and to conspire with others in the neighborhood

to do the same." (Pls.' Resp. Facts, Attach., Ex. MM [Opening Statement].) Even if, as defendants argue, the use of the word "dozens" is non-defamatory hyperbole, the Quigleys rightfully argue that whether or not the Quigleys attempted to intimidate or threaten the Aronsons is capable of being proven true or false. Similarly, the bulk of Rosenthal's fourth statement above, adumbrating alleged activities of the Quigleys, provides facts which may be considered defamatory. Finally, the statement that "the Aronsons haven't done anything, they simply moved into the house. . . ." could also be understood as an assertion of fact. *Living Will Ctr. v. NBC Subsidiary (KCNC), Inc.*, 879 P.2d 6, 10 (Colo. 1994).

Given that even defendants do not argue that every one of their allegedly defamatory statements was mere opinion, it is not entirely clear to me what purpose is served by addressing a relatively small number of the factual allegations against defendants in the summary judgment context. (*Compare* Defs.' First Amendment Br. at 16 [listing statements which defendants allege are not defamatory as a matter of law] *with* Pls.' Resp. Facts, Attach., Ex. MM [Opening Statement] [alleging twenty-one defamatory statements], Ex. SS [Greg Dobbs Program broadcast, Dec. 7, 1995] [alleging forty-two defamatory, statements].) Having culled out the factual – and therefore, potentially defamatory statements – from the five statements which defendants cite as "mere opinion," however, I can agree that the remaining parts of the above passages are not actionable as defamation. I am nonetheless left with an enormous number of defamatory, factual statements to consider in terms of defendants' negligence.

c. Defamatory Communications

i. Negligence: Statements About Private Individuals

Having established that defendants made statements prior to December 9, 1994, which are more than mere opinions, I now evaluate whether a reasonable juror could find that these statements were negligently made. "One who publishes a false and defamatory communication concerning a private person . . . is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them." Restatement (Second) of Torts § 580B (1977). Interestingly, neither of the parties raises the issue of whether defendants acted negligently in making statements about the Quigleys, concentrating instead on whether or not defendants' statements were made with actual malice. Based on my own review of the record, however, I find that the Quigleys have presented sufficient evidence of defendants' negligence to survive summary judgment on all of their defamation-based claims.

In arguing that defendants acted with actual malice, the Quigleys offer several reasons for finding that defendants acted at least negligently in publishing defamatory statements about the Quigleys. First, I find that the Quigleys have adduced sufficient evidence that defendants failed to reasonably investigate before making public comments which may have denigrated the Quigleys. Failure to investigate obvious sources of refutation or corroboration of statements, especially when there is no time-pressure on their publication, may indicate not only negligence, but the higher standard of actual malice. *Burns,* 659 P.2d at 1362.

Here, it is undisputed that defendants called a press conference to speak about the dispute between the Aronsons and the Quigleys without speaking to any third party such as the Quigleys or other neighbors, to confirm, deny, or expand upon the information contained within the tape recordings. Further, neither Rosenthal himself nor any member of the ADL staff listened to the contents of the tapes, (Pls.' Resp. Facts, Attach., Ex. R [Rosenthal Dep. at 160-61]), but Rosenthal nonetheless attested intentionally and publicly to the "non-controvertible" [sic], "compelling," and "overwhelming" evidence which the tapes provided, (*id.*, Attach., Ex. SS [Greg Dobbs Program broadcast, Dec. 7, 1995]). Aside from the contents of the Aronsons' complaint, Rosenthal's only source of information concerning the dispute between the Aronsons and the Quigleys came from Towbin, who received only oral information directly from the Aronsons. (*Id.*, Statement of Additional Disputed Facts ¶¶ 101-02.) I find that a reasonable jury could determine that Rosenthal's broad, extensive, and public assertions were negligently made in light of this arguably limited research base. Indeed, Rosenthal himself suggests that he may not have spoken in sufficiently careful terms when he made some of his public statements about the Quigleys. With regard to his statement that the Quigleys were responsible for "dozens" of attempts to intimidate, threaten, and do harm to the Aronsons, for instance, Rosenthal acknowledged that "in retrospect, ["dozens"] probably overstates the number that [he] thought was taking place at that time." (*Id.*, Attach., Ex. R [Rosenthal Dep. at 577-78].) A reasonable juror could, upon hearing such facts, determine that Rosenthal had not acted with due care in making such an allegation.

In sum, I find that the Quigleys have met their burden to sustain claims against defendants for defamation, claims involving disclosure of material obtained through wiretapping, and other torts based on defamatory statements. I must therefore deny defendants' motion for summary judgment on first amendment grounds insofar as it concerns statements made before the dispute between the Aronsons and the Quigleys became a matter of public concern.

ii. Actual Malice: Statements About Private Individuals in Public Controversy

As noted above, defamatory incidents which occurred after the district attorney's office announced its criminal charges against the Quigleys are evaluated under the higher, actual malice standard. Similar to allegations of their complaint referred to above, the Quigleys declare in their compendium of facts for this order that "Rosenthal and ADL continued to make false and defamatory statements about the Quigleys to the media during December, 1994, and into 1995 and beyond." (*Id.*, Statement of Additional Disputed Facts ¶ 127.) The Quigleys, however, offer no citation for this asserted fact, and therefore, I cannot just deem it admitted or otherwise undisputed. The Quigleys do allege, however, facts and evidence concerning two statements which were made after December 9, 1994, which they suggest constitute actionable defamation: (1) a letter from two ADL national officers which "continued to smear the Quigleys as persons guilty of anti-Semitic conduct"; and (2) ADL's statement apparently responding to the district attorney's announcement that it was filing criminal charges against the Quigleys for ethnic intimidation. (*Id.*, Statement of Additional Disputed Facts ¶¶ 135,

139.) I consider each of these statements in turn to determine whether it provides a basis for a defamation claim.

(1). Letter to ADL Board

Regardless of defendants' level of fault in issuing this letter, I find that none of the statements within it is capable of a defamatory meaning. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). "The question of whether or not the meaning of a particular communication is defamatory is one for the court. . . ." W. Page Keeton, et al., *Prosser and Keeton on Torts* § 111, at 482 (West 5th ed. 1984); *see also Pope v. Chronicle Pub. Co.,* 95 F.3d 607, 613 (7th Cir. 1996) (quoting same). Thus, a district court may grant summary judgment on a defamation claim where the statement at issue is not "reasonably capable of a defamatory meaning." *Clark v. American Broad. Cos., Inc.,* 684 F.2d 1208, 1214 (6th Cir. 1982) (citation omitted).

In December 1995, ADL's national chairman and national director sent a letter to their board members concerning developments in the dispute between the Aronsons and the Quigleys. (Pls.' Resp. Facts, Attach., Ex. DDD [Letter from Strassler and Foxman to Board Member(s) of 12/18/95].) The letter, taken as a whole, concerns ADL's role in the dispute and its assurance to board members that, while court orders prevented the ADL from speaking publicly about the matter, the ADL was concerned about the impact of the events on Colorado and ADL community. (*Id.,* Attach., Ex. DDD [Letter from

Strassler and Foxman to Board Member of 12/18/95].) "The letter refers to the Quigleys only twice, stating that (1) the Jefferson County District Attorney's Office entered into a settlement agreement with the Quigleys, and (2) the Quigleys expanded their original claims against the Aronsons and [ ] Rosenthal to include ADL, [ ] Lozow, and [ ] Kritzer." (*Id.*, Attach., Ex. DDD [Letter from Strassler and Foxman to Board Member of 12/18/95].) No reasonable juror could deem these statements to be harmful to the Quigleys' reputation under any standard of fault. Accordingly, I find that the contents of this letter may not, as a matter of law, be considered a basis for any defamation or defamation-based claim.

(2). Press Release

In the second alleged instance of actionable defamation following the district attorney's December 9, 1994, announcement that it was filing criminal charges against the Quigleys, the Quigleys cite a statement to the press, apparently issued by ADL in response to the district attorney's announcement. Although there is no information or evidence concerning the manner and extent to which it was released, the statement itself reads:

> Evidently the Jefferson County District Attorney believes there is sufficient evidence to prove the Quigleys guilty of criminal behavior. Under our system of law it remains for a court to make the judgment about the strength of that evidence. If the court agrees with the District Attorney then it affirms ADL's strong belief that the kind of behavior the Quigley's [sic] have been accused of has no place in our society.

(*Id.*, Attach., Ex. XX [Statement on Criminal Prosecution].) Unlike the letter to the ADL board members, this statement could deter people from choosing to associate or deal with the Quigleys because it indicates that the Quigleys have acted in ways which could be considered criminal. It is, therefore, the only one of defendants' statements which I must examine through the actual malice lens.

To demonstrate actual malice, a plaintiff must demonstrate that the defendant in fact entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity. *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968). Neither a failure to fully (or reasonably) investigate nor a failure to recognize the import of the consequences of publication for a defendant constitutes actual malice or bad faith. *Id.* at 733; 88 S. Ct. at 1326. Nonetheless, the Court in *St. Amant* noted that a defendant in a defamation action brought under the actual malice standard cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." *Id.,* 390 U.S. at 732, 88 S. Ct. at 1326. As examples of bad faith, the Court offers the rather extreme examples of a defendant who has wholly fabricated the statement or relied on an informant whose veracity is obviously dubious. *Id.* A public-figure plaintiff must establish actual malice by clear and convincing evidence at the summary judgment stage, just as at trial, to defeat summary judgment. *Anderson,* 477 U.S. at 255, 106 S. Ct. at 2513.

Although the Quigleys do not argue about defendants' actual malice surrounding this particular statement, I find that they would nonetheless be unable to demonstrate this

high standard of fault on the part of defendants. The record in this case is not only devoid of material manifesting a reckless disregard of the truth or falsity of this statement, but also bears significant evidence that this statement is a truthful account of recent events, i.e., the district attorney's announcement and the court proceedings which the announcement would initiate. To the extent that this press statement incorporates ADL's opinion that "the kind of behavior [of which] the Quigley's [sic] have been accused [ ] has no place in our society," such a statement is also unactionable. Unlike earlier statements which offered facts and condemnation regarding the Quigleys' conduct, this statement does not attribute any acts to the Quigleys themselves. It is, therefore, a privileged statement of opinion, "phrased in terms of 'apparency.'" *Sall,* 782 P.2d at 1217. Because the Quigleys have not demonstrated the falsity of this statement, much less the actual malice of its publisher, the press release issued after the district attorney's December 7, 1994, announcement about the charges against the Quigleys is not a defamatory statement. In light of this finding and that concerning the letter to ADL board members examined above, I find that the Quigleys have offered no basis for finding that defendants published any defamatory statements on or after December 9, 1994, even though they may have negligently made defamatory statements about the Quigleys prior to that point.

4. *Motion for Summary Judgment: Violation of Constitutional Rights*

Section 1983 provides:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C.A. § 1983. To establish a claim under section 1983, then, "a plaintiff must allege (1) deprivation of a federal [or constitutional] right by (2) a person acting under color of state law." *Watson v. City of Kansas, Kan.*, 857 F.2d 690, 694 (10th Cir. 1988) (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572 [1980]). More specifically, to prevail on their section 1983 claims, the Quigleys must show that defendants acted in reckless disregard of or deliberate indifference to the known or obvious consequences of their actions. *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1390-91, 137 L. Ed. 2d 626 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989).

The parties agree that the Federal Wiretap Act embodies the federal rights at issue in this case. The Federal Wiretap Act generally proscribes the warrantless, non-consensual interception of "wire," "oral," and "electronic" communications. *See* 18 U.S.C.A. § 2511(1)(a). The statute also makes it unlawful for any person to intentionally "disclose" or "use" the "contents of any wire, oral, or electronic communication" when such person knows or has reason to know that the information was illegally intercepted. *See id.* § 2511(1)(c)-(d). Defendants assert that the Quigleys may not maintain a section 1983 claim that defendants violated their constitutional right to be free

from unlawful searches and seizures because (1) the Quigleys had no reasonable expectation of privacy to protect their cordless phone communications under the Federal Wiretap Act, and (2) defendants were not acting under color of state law. (Defs.' Constitutional Br. at 2.)

The parties focus first on whether or not the Quigleys' recorded cordless phone conversations fall under the auspices of the Federal Wiretap Act. Prior to October 25, 1994, the Federal Wiretap Act defined the term "wire communication" as:

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . *but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.*

18 U.S.C.A. § 2510(1) (emphasis supplied). The pre-October 25, 1994, version of the Federal Wiretap Act similarly provided that the term "electronic communication" means:

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . . *but does not include –*
>
> (A) *the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit. . . .*

18 U.S.C.A. § 2510(12)(A) (emphasis supplied).

On October 25, 1994, however, Congress extended the coverage of the Federal Wiretap Act to *include* the radio portion of cordless-telephone communications by striking the above-referenced exceptions from sections 2510(1) and 2510(12)(A). *See* Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, § 202(a), 108 Stat. 4279, 4290 (Oct. 25, 1994); *see also In re Askin,* 47 F.3d 100, 102-03 (4th Cir. 1995) (discussing amendment). Contrary to defendants' arguments, the amendments to the Federal Wiretap Act make plain that any interception of cordless-telephone conversations occurring on or after October 25, 1994, is impermissible.

The issue of the Quigleys' pre-October 25, 1994, communications is more complicated. The Quigleys contend that these communications may be considered "oral communications," for which both the former and present versions of the Federal Wiretap Act provide some protection. (Pls.' Resp. at 54 n.35.) Both versions of the Federal Wiretap Act define the term "oral communication" as:

> any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

18 U.S.C.A. § 2510(2). Although it appears that the Tenth Circuit has not specifically addressed the issue, "virtually every court to have faced the question of whether cordless phone conversations were oral communications under [section] 2510(2) answered in the negative." *In re Askin,* 47 F.3d at 103 (citing *United States v. Smith,* 978 F.2d 171, 174-76 [5th Cir. 1992]; *Tyler v. Berodt,* 877 F.2d 705, 706-07 [8th Cir. 1989]; *United States v. Carr,* 805 F. Supp.

1266, 1271-72 [E.D.N.C. 1992]; *Edwards v. Bardwell,* 632 F. Supp. 584, 589 [M.D. La. 1986]); *see also United States v. Mathis,* 96 F.3d 1577, 1583 n.4 (11th Cir. 1996) (quoting *Askin* for same proposition). I see no reason not to follow the logic of these other jurisdictions.

Because the Federal Wiretap Act provides no protection for plaintiffs' cordless telephone conversations prior to October 25, 1994, as a matter of law, I cannot find that defendants violated section 1983 during that time period. Accordingly, defendants' motion for summary judgment concerning constitutional violations is granted to the extent that it refers to cordless telephone interceptions prior to October 25, 1994. As explained above, however, defendants' interceptions of conversations occurring on or after October 25, 1994, were impermissible under the amended Federal Wiretap Act. If these later communication interceptions are deemed to have occurred "under color of state law," then I must deny defendants' motion for summary judgment as it regards the Quigleys' intercepted conversations on or after October 25, 1994.

As noted above, section 1983 imposes liability where a deprivation of a right secured by the Constitution or laws occurs "under color of state law." 42 U.S.C.A. § 1983; *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S. Ct. 1598, 1604, 26 L. Ed. 2d 142 (1970). Where the defendant is a private party, the question is whether its "conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S. Ct. 2777, 2785, 73 L. Ed. 2d 534 (1982); *see also Pino v. E.P. Higgs,* 75 F.3d 1461, 1464 (10th Cir. 1996) (noting that "state action necessarily constitutes action under color of state law"). "The ultimate issue in determining

whether a [defendant] is subject to suit under [section] 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the state?'" *Rendell-Baker v. Kohn,* 457 U.S. 830, 838, 102 S. Ct. 2764, 2770, 73 L. Ed. 2d 418 (1982) (citation omitted). If the defendant did not engage in what is deemed state action, then section 1983 liability is not appropriate. *See id.* at 838, 102 S. Ct. at 2770 (explaining that, if the action of the defendant is not state action, the inquiry into liability ends).

The Tenth Circuit has acknowledged that Supreme Court precedent takes a flexible, fact-specific approach to the state-action doctrine. *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1447 (10th Cir. 1995). *Gallagher* outlines four tests which the Supreme Court has articulated concerning the determination of state action: (1) the nexus test; (2) the symbiotic relationship test; (3) the joint action test; and (4) the public function test. *Id.* at 1448-56. Because I find that the Quigleys have offered sufficient evidence to satisfy the nexus test, I do not apply the other tests to these facts.

The party alleging state action must show that "'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum,* 457 U.S. at 1004, 102 S. Ct. at 2786 (quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 [1974]). The Tenth Circuit has noted that, under the nexus test, the state will be held liable "only if it is responsible for the specific conduct of which the plaintiff complains," and the state does more than offer "mere approval of or acquiescence in the initiatives of a private party. . . ." *Gallagher,* 49 F.3d at

1448 (citations omitted). In addition, a state will generally be held responsible for private conduct "when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum,* 457 U.S. 991 at 1004, 102 S. Ct. at 2785-86.

In this case, the Quigleys assert that the Aronsons' private conduct constitutes thinly-veiled state action. Specifically, the Quigleys offer evidence that the Aronsons continued to intercept the Quigleys' phone conversations "on the orders of the Jefferson County District Attorney" despite the fact that Mrs. Aronson was "very concerned that they had to keep taping." (Pls.' Resp. Facts, Attach., Ex. T [Towbin Dep. at 275].) I agree that these facts – which defendants do not counter – suggest the sort of coercion to public action through particularized private conduct which the nexus test addresses. *Cf. Willis v. University Health Servs., Inc.,* 804 F. Supp. 1557, 1559 (S.D. Ga. 1992) (finding no sufficient nexus between state in form of county hospital authority and university health service where, *inter alia,* county hospital authority did not coerce or encourage university health service to fire registered nurse). I note, however, that the same witness also states that Mrs. Aronson was "very agitated that the [district attorneys] haven't [sic] pursued – she didn't feel the [district attorneys] were pursuing it very aggressively with the Quigleys. . . . " (*Id.,* Attach., Ex. T [Towbin Dep. at 276].) Certainly, these two remarks create a question of fact as to whether the Aronsons were, in fact, engaging in state action or, rather, were pursuing their own agenda, and merely sought to engage the district attorney's office in their personal pursuits. Given this conflict, a reasonable jury could find that such conduct, to the extent it occurred

on or after October 25, 1994, constituted state action depriving the Quigleys of their civil rights in violation of section 1983.

The Quigleys further contend that, although Aronsons were the particular private actors intercepting and recording the Quigleys' conversations, defendants may be held liable for the Aronsons' conduct on the grounds that defendants and Aronsons were co-conspirators in the attempt to violate the Quigleys' civil rights. Where one co-conspirator acts in violation of section 1983, liability may be imputed to all co-conspirators. *Dixon v. City of Lawton, Okl.,* 898 F.2d 1443, 1449 n.6 (10th Cir. 1990). The existence or nonexistence of a conspiracy is usually a question of fact. *Singer v. Wadman,* 745 F.2d 606, 608 (10th Cir. 1984) (citing *Adickes,* 398 U.S. at 176, 90 S. Ct. at 1618 [1970]). "A civil conspiracy is the combination of two or more persons acting in concert, either to commit an unlawful act, or to commit a lawful act by unlawful means." *Id.* (citation omitted). Defendants here offer no evidence to refute the allegation that they acted in concert with the Aronsons and the district attorney's office in arranging and publicizing the intercepted comments of the Quigleys. The Quigleys, on the other hand, offer evidence that defendants knew information concerning the Aronsons' interception of the messages and their coordination with the district attorney's office, as well as actively participated in the release of information from the recorded conversations at the press conference. (Pls.' Resp. Facts, Attach., Ex. Z [Lozow Dep. at 145].) Thus, even if defendants were not directly responsible for intercepting the Quigleys' phone calls on or after October 25, 1994, they may nonetheless be held liable if it is determined that, in so doing, the Aronsons violated the Quigley's civil rights.

Accordingly, defendants' motion for summary judgment concerning constitutional violations is denied to the extent that it refers to conduct occurring after October 24, 1994; it is granted in all other respects.

5. Motion for Summary Judgment: Agency

An agency is a "'fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *City & County of Denver v. Fey Concert Co.*, 960 P.2d 657, 660 (Colo. 1998) (en banc) (quoting Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* § 2 at 4 [2d ed. 1990]). The control a principal exercises over the manner of work performed by an agent is evidence that an agency relation exists. *United States v. Young*, 736 F.2d 565, 567-68 (10th Cir. 1983), *rev'd on other grounds*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). More specifically, the most important factor in determining whether a person is an agent is the principal's right to control the agent, not the fact of control. *Moses v. Diocese of Colo.*, 863 P.2d 310, 324 (Colo. 1993) (en banc) No one factor, however, including control, is determinative. *Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1220 (Colo. Ct. App. 1990). The existence of an agency relationship is usually a question of fact, although where there are no material facts in dispute, the issue may be determined as a matter of law. *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 395 (Colo. 1987).

Defendants contend that, because Kritzer and Lozow were not agents of ADL, their actions may not be imputed to the ADL for purposes of vicarious liability. In particular,

defendants urge me to dismiss the Quigleys' claims against the ADL for (1) Federal Wiretap Act violations, (2) malicious prosecution, (3) abuse of process, and (4) intentional interference with prospective employment opportunity.[2] I note at the outset that, although defendants seek dismissal of these claims outright, in several places, defendants' argument is inappropriate to the extent that the Quigleys' factual assertions against ADL are not based exclusively on the conduct of Kritzer or Lozow acting as ADL agents. For instance, one of their claims under the Federal Wiretap Act and their claim for malicious prosecution allege impermissible conduct on the part of both defendants directly and through their agents. (Consolidated Compl. ¶¶ 119, 177-78.) Further, the Quigleys' claim for intentional interference with prospective economic advantage does not even mention Kritzer or Lozow. (*Id.* ¶¶ 187, 189.) Accordingly, to the extent that I find Kritzer and Lozow functioned as ADL agents, I dismiss only the portion of these claims which relies on that relationship for a finding of liability.

Defendants have summarized their relevant factual data with the legal conclusions that neither Lozow nor Kritzer was "acting as an agent of or representing ADL while representing his clients, the Aronsons." (ADL and Rosenthal's Br. in Supp. of Summ. J. re: Claims of Agency, Statement of Undisputed Material Facts ¶¶ 1-2 [filed Aug. 12, 1998] [hereinafter "Defs.' Agency Br."].) While such

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[2] I note that the Quigleys' claims for malicious prosecution and intentional interference with prospective employment opportunities are also alleged against Rosenthal. (Consolidated Compl. ¶¶ 174-79, 186-89).

conclusory statements are insufficient to establish or refute an agency relationship as a matter of law, defendants support these factual assertions with more specific citations to the record. Upon consideration of this cited evidence, I find that Lozow testified that he "didn't discuss in one fashion or another the transcripts" of recorded calls of the Quigleys with Rosenthal, nor was he "talking to the ADL about the heart of this case or [ ] Rosenthal about [his] opinions about the case." (*Id.*, Ex. 1 [Lozow Dep. at 171-72].) Lozow further stated, without defining who constituted "we," that:

> We didn't include the ADL in tactical decisions that were made after a commitment was made to go ahead in the civil case. We didn't include them. We didn't ask for their input. We weren't guided by them, and we didn't tell them specifically what our legal decisions, what they were grounded upon.

(*Id.*, Ex. 1 [Lozow Dep. at 174].) Finally, Lozow declared that he "didn't consider the ADL to be who [sic] [he] was representing." (*Id.*, Ex. 1 [Lozow Dep. at 175].) In a similar vein, Kritzer testified that he told Towbin that "the Aronsons were [his] client, not the ADL." (*Id.*, Ex. 2 [Kritzer Dep. at 193].) Kritzer also stated that, between November 8 and December 6, 1994, he did not communicate with anyone other than attorneys from Lozow's firm concerning the proposed civil lawsuit which the Aronsons would file against the Quigleys. (*Id.*, Ex. 2 [Kritzer Dep. at 193].) Finally, Kritzer states that he was "retained and . . . was going to be retained by the Aronsons. [He] was brought into [the case] by [ ] Lozow. The referral didn't come from the ADL. The ADL was not [his] client. [He] wasn't working for the ADL. [He] had no attorney-client relationship

with [the ADL]," even though he knew that the ADL was interested in the case and the ADL was present at two meetings about the issue prior to November 8, 1994. (*Id.*, Ex. 2 [Kritzer Dep. at 195].) Contrary to the Quigleys' assertions, (Pls.' Resp. at 3-6), I find these allegations sufficient to satisfy defendants' initial burden of demonstrating that Kritzer and Lozow were not their agents.

After a consideration of the facts which the Quigleys present in their responsive brief, however, I conclude that there are disputed facts which preclude me from granting defendants' motion for summary judgment. Among the facts upon which the Quigleys rely to buttress their argument that Kritzer and Lozow were agents, I find that only the following are both relevant and supported by evidence in the record:

> (1) Lozow advised the Aronsons that their illegal interception of the Quigleys' telephone conversations was not an illicit activity. (Pls.' Resp. Facts., Attach., Ex. Z [Lozow Dep. at 141-42]);
>
> (2) Kritzer and Lozow participated in at least one strategy session with the Aronsons and ADL representatives on November 8, 1994, in which they agreed to prepare the Aronsons' civil lawsuit against the Quigleys and to facilitate the criminal prosecution of the Quigleys. (*Id.* Attach., Ex. CC [Kornfeld Dep. at 105-08]);
>
> (3) After signing a representation agreement with the Aronsons in December 1994, Kritzer and Lozow continued to serve defendants' interests over the interests of the Aronsons. That is, although the Aronsons preferred a private resolution of the matter, and Mr. Aronson preferred

not to have a press conference, Kritzer and Lozow failed to advise them to that effect, instead cohering with ADL's and Rosenthal's preferences for filing a case before negotiation and holding a public press conference. (*Id.*, Statement of Additional Disputed Facts ¶¶ 78, 80-81, 96-97);

(4) On December 6, 1994, Rosenthal, Kritzer, Andy Silverman (an associate in Kritzer's firm), Towbin, and the Aronsons met to discuss "how the Aronsons wanted to handle the inquiries from the press." (*Id.*, Attach., Ex. T [Towbin Dep. at 305].) At the conclusion of the meeting, it was decided that there would be a press conference the following day to discuss the filing of the complaint, a decision which Rosenthal favored, but Mr. Aronson opposed. (*Id.*, Attach., Ex. M [Mr. Aronson Dep. at 487-89]);

(5) Before the press conference on December 7, 1994, Rosenthal provided Kritzer with a copy of his Opening Statement for Kritzer's editorial input. Kritzer, the Aronsons, Towbin, and perhaps others also discussed Rosenthal's Opening Statement, to be delivered at the press conference on December 7, 1994. (*Id.*, Attach., Ex. T [Towbin Dep. at 369-70]);

(4) When Rosenthal introduced the individuals present at the press conference on December 7, 1994, he noted Kritzer's presence, but did not specify that Kritzer was the Aronsons privately retained counsel and therefore distinguishable from the other press conference participants. (*Id.*, Attach., Ex. MM [Opening Statement]);

(5) Pursuant to a 1998 settlement between Kritzer, Lozow, the Aronsons, and the Quigleys, Kritzer and Lozow agreed to pay a total of

> $350,000 to the Quigleys and $50,000 to the Aronsons. The ADL, in turn, has provided $50,0000 to Lozow and $5,000 to Kritzer, representing their respective insurance deductibles for legal expenses relating to the Aronson/Quigley litigation. (*Id.*, Attach., Ex. FFF [Letter from Meltzer to Kritzer of 6/10/96], Ex. GGG [Letter from Meltzer to Greengard of 4/22/98].)

Among these alleged facts, I find most persuasive that Kritzer and Lozow participated in meetings with both the Aronsons and ADL representatives on at least two occasions, November 8, 1994, and December 6, 1994.

Although Kritzer and Lozow's conduct and affiliations on some of these occasions are not completely clear, construing the evidence in the light most favorable to the Quigleys, I cannot definitively find that Kritzer and Lozow were not effectively functioning as agents of the ADL and/or Rosenthal. Certainly, there is evidence to contradict Lozow's testimony that ADL was not included in any tactical decision-making, even if some of the decisions were made prior to the formal start of the attorney-client relationship between Kritzer and Lozow and the Aronsons. Further, that the ADL helped to compensate Kritzer and Lozow for losses sustained due to their work with the Aronsons suggests that Kritzer and Lozow may have been serving the ADL's interests as well as, or in conflict with, the Aronsons' interests. Because any conclusion concerning Kritzer and Lozow's agency would require a credibility determination, making such a conclusion is premature at this juncture. In addition, because I deny the motion on this basis, I do not entertain the Quigleys' further arguments that defendants should be held liable for Kritzer and Lozow's conduct because they were all co-conspirators.

(Pls.' Br. at 50-51.) I therefore deny defendants' motion for summary judgment on agency.

6. Conclusion

Based on the foregoing, it is therefore

ORDERED as follows:

1. Defendants' motion for reconsideration (# 241-1) is GRANTED. The motion for a protective order (# 241-2) is likewise GRANTED. The oral ruling entered July 23, 1998, is VACATED insofar as it granted plaintiffs' motion to compel production of documents responsive to request no. 6 in plaintiffs' second set of interrogatories and request for documents.

2. Defendants' motion for summary judgment concerning the First Amendment (# 254) is GRANTED in part and DENIED in part.

3. Defendants' motion for summary judgment concerning the First Amendment is GRANTED in part. Because plaintiffs' have failed to produce sufficient evidence that any statements made after December 9, 1994, (the date on which the events in question became a matter of public concern), were made with malice, the defamation claims cannot be based on statements made after that date.

4. Defendants' motion for summary judgment concerning the First Amendment is DENIED in all other respects.

5. Defendants' motion for summary judgment concerning constitutional violations (# 250) is GRANTED in part and DENIED in part.

6. Defendants' motion for summary judgment concerning constitutional violations is GRANTED in part. Upon my determination that the cordless telephone interceptions were not prohibited by the federal wiretap statute prior to October 25, 1994, plaintiffs cannot use such conversations to establish liability under section 1983.

7. Defendants' motion for summary judgment concerning constitutional violations is DENIED in all other respects.

8. Defendants' motion for summary judgment concerning agency (# 252) is DENIED.

9. Plaintiffs' motion to strike and exclude from evidence the expert testimony of Thomas Kelley (# 239) is DENIED.

10. Plaintiffs' motion to strike and exclude from evidence testimony from Levin and Johnston (# 244) is DENIED.

11. Defendants' motion for a protective order regarding the Foxman deposition (# 248) is GRANTED.

12. Plaintiffs' motion to extend time to disclose rebuttal experts (# 260) is GRANTED. Reports from experts designated to rebut the testimony of Kelley, Levin, and Johnston shall be served within thirty days of the date of this order. All depositions of such rebuttal experts (together with depositions of heretofore endorsed experts) shall be concluded within sixty days of the date of this order.

13. Plaintiffs' motion to file certain reply briefs (# 266) is GRANTED.

14. Plaintiffs' motion to designate Patten and/or substitute Patten for Aucone (# 272) is DENIED.

15. Plaintiffs' motion to deviate (# 278) is GRANTED.

16. Plaintiffs' motion to file more paper concerning the Foxman deposition (# 288) is DENIED.

17. Plaintiffs' motion to supplement their opposition to the motion for reconsideration (# 289) is GRANTED.

18. Plaintiffs' motion to conclude the depositions of two specified fact witnesses after the final pretrial conference (# 300) is GRANTED.

Dated this 28 day of February, 1999.

BY THE COURT:

EDWARD W. NOTTINGHAM

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 94 N 2782 (Consolidated with Civil Action No. 95 N 2916 for all purposes)

WILLIAM QUIGLEY and DOROTHY QUIGLEY,

Plaintiffs,

v.

SAUL F. ROSENTHAL, in his individual capacity and in his capacity as representative of the Anti-Defamation League, and the ANTI-DEFAMATION LEAGUE,

Defendants.

ORDER AND MEMORANDUM OF DECISION

(Filed Mar. 31, 2001)

This is a defamation and federal wiretap case. Plaintiffs William and Dorothy Quigley allege that Defendants the Anti-Defamation League ("ADL") and Saul F. Rosenthal, in his individual and representative capacity, conducted a campaign of defamation against them in order to falsely portray them as anti-Semites. Plaintiffs' case was tried to a jury commencing on April 2, 2000. On April 28, 2000, the jury returned a verdict in favor of plaintiffs and against defendants. This matter is before the court on the following post-trial motions: (1) "Defendants' Motion to Amend or Reduce Judgment, for a New Trial, or for Judgment as a Matter of Law" filed May 12, 2000; (2) "Plaintiffs' Motion to Treble State Law Punitive Damages Awarded Against Anti-Defamation League" filed May 11, 2000; (3) "Plaintiffs' Motion for an Award of Prejudgment

Interest and an Award of Postjudgment Interest" filed May 11, 2000; (4) "Plaintiffs' Motion for an Order Requiring Defendants to Produce the Summaries Used by Their Counsel During His Closing Argument to the Jury" filed May 22, 2000; and (5) "Defendants' Motion to Amend Post-Trial Motions With Citations to the Record" filed March 21, 2001. Jurisdiction is based on 28 U.S.C.A. §§ 1331, 1343(a), and 1367 (West 1993).

FACTS

In August 1994, Mitchell and Candice Aronson (now Ross) moved into a house at 1724 Prima Lane in Evergreen, Colorado. Plaintiffs lived two doors from the Aronsons. Beginning in fall 1994, the Aronsons and the Quigleys developed an antipathy which has since evolved into extensive and protracted litigation involving multiple parties.[1] The Aronsons believe that plaintiffs did not want them to live in the neighborhood because they are Jewish. According to the Aronsons, beginning shortly after they moved into their new home, plaintiffs concocted a scheme – referred to as "Operation Aronson" – to drive the Aronsons out of the neighborhood. Sometime in late summer or early fall 1994, the Aronsons began using a police scanner to intercept and then tape record plaintiffs' cordless telephone conversations. The Aronsons maintain (as do defendants) that plaintiffs made anti-Semitic comments

[1] The catalyst of this dispute appears to have been the families' two dogs: the Quigleys insisted that the Aronsons' dog, Bear, was running amuck throughout the neighborhood, terrorizing plaintiffs and their dog, Cody.

about the Aronsons and their children in these intercepted telephone conversations.

On October 21, 1994, Mr. Aronson contacted the ADL and reported to Barbara Towbin, senior associate director of ADL's Mountain States regional office, that plaintiffs were harassing him and Mrs. Aronson because they are Jewish. Between October 21 and December 7, 1994, the Aronsons continued to intercept and record plaintiffs' cordless telephone conversations. During this time, the Aronsons spoke with Towbin on an almost daily basis, informing her of plaintiffs' alleged campaign of harassment directed at them. Towbin referred the Aronsons to attorney Gary Lozow, who, in turn, brought in another attorney, Stewart Kritzer, to meet with the Aronsons and assist in their legal representation. Both Lozow and Kritzer voluntarily served as board members of the ADL's local office.

On October 22, 1994, the Aronsons first met with Lozow to discuss whether they should contact the police and whether it was legal to intercept and record cordless telephone calls. The next day, Lozow's assistant, Rick Kornfeld, researched the legality of the Aronson's [sic] conduct and informed Lozow that he believed that the Aronsons taping was not illegal under state or federal law.[2] On October 23, 1994, Lozow contacted Assistant Jefferson

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[2] The federal wiretapping statute is contained in the Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by the Electronic Communications Privacy Act of 1986 and the Communications Assistance for Law Enforcement Act of 1994, 18 U.S.C.A. §§ 2510-22 (West 2000) [hereinafter "Federal Wiretap Act"]. Plaintiff's wiretap claims are based solely on federal law.

County District Attorney Mark Pautler to relay the Aronsons' concerns about plaintiffs and to inquire into the procedure for reporting a suspected crime. During this conversation, Pautler expressed his belief that it was not illegal to intercept cordless telephone calls. Lozow later spoke with Jefferson County District Attorney Dave Thomas who also opined that it was legal to tape cordless telephone calls. Unbeknownst to Lozow, Kornfeld, Pautler, or Thomas, Congress amended the Federal Wiretap Act on October 25, 1994, to extend its coverage to cordless telephone, thereby making the post-October 25, 1994, recording of plaintiffs' cordless telephone calls illegal.

Unsatisfied with the progress of Jefferson County's criminal investigation into the plaintiffs' alleged anti-Semitic conduct, the Aronsons and their attorneys met to discuss whether to pursue a civil lawsuit against plaintiffs. Towbin and/or other ADL representatives attended these meetings. On December 6, 1994, the Aronsons fired the opening salvo in this litigation by filing a complaint in this court against plaintiffs, alleging ethnic intimidation and violation of their civil rights. Kritzer and Lozow represented the Aronsons in this action. The Aronsons' complaint consisted almost entirely of references to excerpts from the intercepted telephone calls of plaintiffs. On December 20, 1994, the Aronsons amended their complaint.

On December 6, 1994, after the Aronsons' complaint had been filed, Denver Post reporter Peter Chronis contacted Rosenthal and the Aronsons' attorneys and asked their opinions about the lawsuit. Later that day, Rosenthal, the Aronsons, and Kritzer met to devise a strategy for dealing with the media. Subsequent to that meeting,

the ADL issued a "Press Advisory" announcing a December 7, 1994, press conference "to present information about a major case of anti-[S]emitism and harassment in the Evergreen, Colorado area and the lawsuit which has resulted from that case." At the press conference, conducted at the ADL's Denver office, Rosenthal read a prepared "Opening Statement" and fielded questions from the media. Rosenthal's comments were quoted extensively in the media, and, on December 7, 1994, Rosenthal appeared on radio station KOA's "Greg Dobbs Program" to discuss the alleged anti-Semitic conduct of plaintiffs. On December 9, 1994, the Jefferson County District Attorney's Office publically announced that it was charging plaintiffs with the crime of ethnic intimidation.

In January 1995, plaintiffs responded to the Aronsons' complaint, denying that they conspired to intimidate the Aronsons or violate the Aronsons' civil rights. Plaintiffs also asserted counterclaims against the Aronsons, Rosenthal, and the ADL. Plaintiffs maintain that, for reasons unknown to them, the Aronsons loathed them and engaged in a campaign of tortious and unlawful conduct against them. According to plaintiffs, the Aronsons, after enlisting the help of Rosenthal and the ADL, continued to illegally intercept plaintiffs' private telephone conversations, transcribe them, and edit them in a manner so as to falsely portray plaintiffs as anti-Semites. Thereafter, plaintiffs believe that the Aronsons together with Rosenthal and the ADL, conducted a press conference wherein they publically labeled plaintiffs as anti-Semitic, and accused them of planning vicious attacks against the Aronsons.

On January 17, 1996, Mr. Quigley upped the ante in this litigation by filing an amended complaint in this court

in a separate lawsuit against the Aronsons, Rosenthal, the ADL, Lozow, and Kritzer. In this lawsuit, Mr. Quigley claimed that the Aronsons, Rosenthal, the ADL, Kritzer, and Lozow violated his rights under the Federal Wiretap Act by intercepting his and his family's private telephone conversations. This case was consolidated with the Aronsons' civil-rights action filed on December 6, 1994.

On April 7, 1997, the Aronsons filed a case against Kritzer in Jefferson County District Court, alleging that he had acted negligently and breached his fiduciary duty to them in the Aronsons' lawsuit against plaintiffs. On February 20, 1998, Kritzer, Lozow, the Aronsons, and plaintiffs reached a settlement agreement whereby Kritzer and Lozow each agreed to pay plaintiffs $175,000, and the Aronsons $25,000, and all parties to the settlement agreed to release one another from liability for all federal and state civil claims between them. This settlement, however, did not incorporate plaintiffs' claims against Rosenthal and the ADL.

In addition to plaintiffs' lawsuits against the Aronsons, Rosenthal, the ADL, Lozow, and Kritzer, plaintiffs notified Jefferson County of their intent to sue the District Attorney's Office and the Sheriff's Department for their roles in investigating and charging plaintiffs with ethnic intimidation. In January 1995, the Jefferson County District Attorney's Office dismissed the ethnic intimidation charges after concluding that there was no basis for these charges. On November 25, 1995, plaintiffs entered into a settlement agreement with the District Attorney's Office and the Sheriff's Department whereby plaintiffs were paid a sum of money and received a public apology from Dave Thomas, the Jefferson County District Attorney.

On April 3, 2000, plaintiffs' claims against Rosenthal and the ADL were tried to a jury of twelve. After seventeen days of trial, the following claims were submitted to the jury: (1) libel *per se* against Rosenthal and the ADL based on Rosenthal's statements during the December 7, 1994, press conference; (2) libel *per se* against the ADL and Rosenthal based on Rosenthal's statements during his appearance on the Gregg Dobbs Program; (3) false light invasion of privacy against the ADL and Rosenthal based on Rosenthal's statements made during the December 7, 1994, press conference and Greg Dobbs Program; (4) invasion of privacy against the ADL based on the interception and/or use of plaintiffs' private telephone calls by Towbin, Lozow, and/or Kritzer, acting as the ADL's agents or co-conspirators; (5) violation of 18 U.S.C.A. § 2511(1)(a) against the ADL based on procuring the interception of and/or intercepting plaintiffs' telephone calls by Towbin, Lozow, and/or Kritzer, acting as the ADL's agents or co-conspirators; (6) violation of 18 U.S.C.A. § 2511(1)(d) against the ADL based on use of the intercepted telephone calls by Lozow, and/or Kritzer, acting as the ADL's agents or co-conspirators to prepare and file the Aronsons' complaint. The issue of punitive damages under both state and federal law was also submitted to the jury.

On April 28, 2000, the jury, using "Special Verdict Form 'A,'" ("Special Verdict Form") returned a verdict in favor of plaintiffs and against Rosenthal and the ADL on all claims except for plaintiffs' claim under 18 U.S.C.A. § 2511(1)(a). The jury awarded Mr. Quigley the following damages: (1) $900,000 in economic damages; (2) $100,000 in non-economic damages; (3) state-law punitive damages of $500,000 against Rosenthal and $250,000 against the ADL; (4) federal-law punitive damages of $5,000,000

against the ADL. The jury awarded Mrs. Quigley the following damages: (1) no economic damages; (2) $500,000 in non-economic damages; (3) state-law punitive damages of $500,000 against Rosenthal and $250,000 against the ADL; and (4) federal-law punitive damages of $2,500,000 against the ADL.

ANALYSIS

1. Defendants' Motion to Amend or Reduce Judgment, for a New Trial, or for Judgment as a Matter of Law

On May 12, 2000, defendants moved to amend or reduce the judgment, for a new trial, or for judgment as a matter of law. (Defs.' Mot. to Amend or Reduce J., for a New Trial, or for J. as a Matter of Law [filed May 12, 2000].) Specifically, defendants seek an order from the court to: (1) set aside or reduce the $7.5 million punitive damages award assessed against the ADL for its violation of the Federal Wiretap Act; (2) set aside or reduce the $500,000 state-law punitive damages award against the ADL; (3) set aside or reduce the $900,000 economic damages award to Mr. Quigley; (4) reduce plaintiffs' compensatory damages by $350,000 based upon Lozow and Kritzer's previous settlement with plaintiffs; and/or (5) reduce the state-law punitive damages award in accordance with the actual amount of damages awarded to plaintiffs; or (6) order a new trial; or (7) enter judgment as a matter of law in favor of ADL and Rosenthal and against plaintiffs. (*Id.*) I shall address these arguments separately, but, before doing so, I find it necessary to set forth the legal standards under which I must evaluate defendants' challenges to the jury's findings.

a. Legal Standards

Judgment as a matter of law "should be cautiously and sparingly granted." *Zuchel v. City & County of Denver*, 997 F.2d 730, 735 (10th Cir. 1993) (internal quotation marks and citations omitted). Defendants are entitled to judgment as a matter of law if the "evidence points but one way and is susceptible to no reasonable inference supporting the party opposing the motion." *Deter* [sic] *v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1268 (internal quotation marks and citations omitted). In reviewing a motion for judgment as a matter of law, the court "will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." *Id.* (citing *Batey v. Willamette Indus., Inc.*, 172 F.3d 1232, 1241 (10th Cir. 1999). The evidence, and any inferences drawn therefrom, must be viewed in favor of the nonmoving party. *Id.* Judgment as a matter of law in defendants' favor is appropriate only if "there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law." *Id.* (internal quotation marks and citations omitted).

As with a motion for judgment as a matter of law, "'[a] motion for a new trial is not regarded with favor and should only be granted with great caution.'" *Franklin v. Thompson*, 981 F.2d 1168, 1171 (10th Cir. 1992) (quoting *United States v. Thornbrugh*, 962 F.2d 1438, 1443 (10th Cir. 1992). Generally, courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or substantial justice has not been done. *Hughes v. Regents of the Univ. of Colo.*, 967 F. Supp. 431, 437 (D. Colo. 1996) (citing *Anthony v. Baker,* 808 F. Supp. 1523, 1525 [D. Colo. 1992]). A new trial is warranted where, having given full respect to the jury's findings and viewing the entire evidence, the trial judge is left with the

"definite and firm conviction that a mistake has been committed." *Anthony*, 808 F. Supp. at 1525 (citing *Landes Constr. Co. v. Royal Bank*, 833 F.2d 1365, 1371-72 [9th Cir. 1987]). The decision to grant a new trial rests within the sound discretion of the district court.

b. Judgment as a Matter of Law

The jury's verdict notwithstanding, Rosenthal and the ADL argue they are entitled to judgment as a matter of law under rule 50 of the Federal Rules of Civil Procedure. (Defs.' Am. Mem. in Supp. of Their Mot. to Amend or Reduce J., for a New Trial, or for J. as a Matter of Law at 32 [filed Mar. 21, 2001] [hereinafter "Defs.' Am. Br."].)[3] The ADL first argues that it is entitled to judgment as a matter of law on plaintiffs' invasion of privacy claim and wiretap claim because there was insufficient evidence to send these claims to the jury. (*Id.*) Specifically, the ADL contends that there was insufficient evidence to establish that Lozow and/or Kritzer were acting as agents or co-conspirators of the ADL. (*Id.*) Without sufficient evidence of an agency relationship, the ADL contends, it cannot be held liable for the actions of Lozow and Kritzer. (*Id.*)

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[3] On March 21, 2001, defendants moved to amend their post-trial motions and briefs to include citations to the record. (Defs.' Mot. to Amend Post-Trial Mots. With Citations to the R. [filed Mar. 21, 2001].) Other than including citations to the record, defendants' recent submissions do not alter, amend, or change in any way the substance of their original filings. Notwithstanding plaintiffs' objection, I shall grant defendants' motion. Where applicable, I shall cite to defendants' amended briefs.

The existence of an agency relationship is generally a question of fact. *Stortoen v. Beneficial Fin. Co.*, 736 P.2d 391, 395 (Colo. 1987). As I stated in colloquy with counsel for both sides during defendants' motion for judgment as a matter of law at the close of plaintiffs' case in chief, the question of agency is a close one with facts pointing both ways. Notwithstanding the testimony of Lozow and Kritzer that they were not acting on behalf of the ADL in pursuing the Aronsons' lawsuit against plaintiffs, there is evidence in the record to support a contrary inference. One example is the ADL's payment of Lozow and Kritzer's insurance deductible in their settlement with plaintiffs and the Aronsons. As I noted in the hearing on defendants' motion for judgment as matter of law, the jury could reasonably infer that the ADL's payment was an admission by the ADL that Lozow and Kritzer had an association with the ADL or that the ADL put Lozow or Kritzer in a position where they sustained losses while acting for the ADL.

In addition, as I noted in my order denying the ADL's motion for summary judgment and at trial, there is dispute as to whose interests Lozow and Kritzer were really serving. In that respect, I raised the point that an agent can serve two principals and that there was evidence to support a reasonable inference that Lozow and Kritzer were doing just that. Evidence was introduced at trial which supports a finding that Lozow and Kritzer shared the ADL's concern about anti-Semitism and education of the public about these concerns, so that the jury could reasonable [sic] infer that Lozow and Kritzer were, at various times, motivated by a desire to expose what they perceived to be plaintiffs' anti-Semitism. There is also evidence in the record from which a jury could reasonably infer that

Lozow and Kritzer preferred the interests of the ADL over those of the Aronsons insofar as Lozow and Kritzer sided with the ADL in holding the December 7, 1994, press conference against the wishes of Mr. Aronson. At the very least, the jury was entitled to find on this evidence that Lozow, Kritzer, and the ADL were co-conspirators, *i.e.*, that they impliedly agreed to accomplish their shared goals through the use of illegal means. *See Contract Maintenance Co. v. Local No. 5*, 415 P.2d 855, 856 (Colo. 1966) ("[A]n action for [civil] conspiracy can not be successfully maintained unless the purpose to be effected is unlawful *or a lawful purpose is accomplished by an unlawful means.*") (emphasis supplied); *see also Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995)(stating elements of civil conspiracy).

In sum, based on the evidence presented at trial, a jury could reasonably conclude that an agency or co-conspirator relationship existed between the ADL and Lozow and/or Kritzer. To the extent that the evidence allows for conflicting inferences as to the nature of the ADL's relationship with Lozow and Kritzer, the conflict was one for the jury to resolve. The court will not disturb the jury's resolution of these factual issues. *Deters*, 202 F.3d at 1268. Accordingly, the ADL is not entitled to judgment as a matter of law on plaintiffs' invasion of privacy and wiretap claims insofar as the viability of these claims depended on the existence of an agency or co-conspirator relationship between the ADL and Lozow and/or Kritzer.

Defendants next argue that judgment should be entered in their favor on plaintiffs' defamation and false light invasion of privacy claims because: (1) there was insufficient evidence to submit these claims to the jury

because plaintiffs did not carry their burden to prove by clear and convincing evidence that Rosenthal and the ADL acted with "actual malice;" and (2) the statements made by Rosenthal and the ADL about plaintiffs were substantially true. (Defs.' Am. Br. at 33-34.) I reject these arguments. First, with respect to the defamation claims, I concluded in ruling at the summary-judgment stage of the litigation that defendants had failed to meet their burden of demonstrating that, at the time Rosenthal read the Opening Statement and appeared on the Greg Dobbs Program, plaintiffs were limited-purpose public figures. Consequently, I ruled plaintiffs' [sic] did not have to prove actual malice. *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1176 (D. Colo. 1999). Prior to trial, I denied defendants' motion for reconsideration of this ruling, and I see no reason to revisit my summary-judgment ruling at this time. Defendants have sufficiently preserved the issue for appeal and may raise it on appeal if they so choose.

Second, as to the sufficiency of the evidence to support plaintiffs' false light invasion of privacy claim, I find that there is sufficient evidence from which the jury could conclude that the ADL acted with the requisite culpability in portraying plaintiffs in a false light. To prevail on their claim for false light invasion of privacy, plaintiffs had to establish by clear and convincing evidence that the ADL "had knowledge of, or acted with reckless disregard as to the falsity of the matter it publicized about [ ] plaintiff[s] and the false light in which [ ] plaintiff[s] would be placed." *Bueno v. Denver Pub. Co.*, No. 97CA1569, 2000 WL 231993 (Colo. Ct. App. Mar. 2, 2000) (recognizing claim for false

light invasion of privacy and stating elements of claim).[4] Evidence adduced at trial revealed that ADL representatives met with the Aronsons and the attorneys (Lozow and Kritzer) to discuss strategies to pursue plaintiffs for their alleged anti-Semitic conduct. These strategies included publicizing plaintiffs' conduct, even though ADL representative Cindy Silverman brought to everyone's attention the potentially catastrophic implications which publicity could have on Mr. Quigley's career in the film industry. In a November 8, 1994, meeting Towbin articulated the ADL's objectives in the matter, which included pursuing criminal prosecution of plaintiffs and the publicity that would be associated with such a prosecution.

There is also evidence that, despite the ADL's desire to expose plaintiffs publically as anti-Semites, neither Towbin nor Rosenthal ever listened to or reviewed the transcripts of plaintiffs' intercepted telephone calls or conducted an investigation to ascertain whether plaintiffs' comments were made simply as part of a dispute amongst neighbors that was not motivated by religious animosity. Rosenthal, in fact, testified that he never met with or spoke to the Aronsons prior to December 6, 1994, one day prior to his reading of the Opening Statement and his

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[4] Any perceived error in my ruling concerning defendants' failure to establish that plaintiffs were limited-purpose public figures with respect to plaintiffs' defamation claims is rendered harmless because plaintiffs' claim for false light invasion of privacy required plaintiffs' [sic] to prove by clear and convincing evidence that the ADL acted with reckless disregard to the falsity of the matter it publicized – *i.e.*, actual malice. The jury, having found actual malice for this claim would surely have had no trouble making a similar finding as to the defamation claims, had it been so instructed.

appearance on the Greg Dobbs Program. Rosenthal also acknowledged that accusations of anti-Semitism carry serious consequences in today's society. On January 6, 1995, Rosenthal sent a memorandum to Towbin in which he stated: "I want to be sure we are maximizing all opportunities that are available from the Aronson case and arrests this week." Rosenthal concluded this memorandum by stating, "[i]n short, 'make hay while the sun shines' – graciously, of course."

The foregoing evidence, provides a sufficient support for a jury finding that the ADL acted recklessly in its efforts to publicize what it perceived to be anti-Semitic conduct. The jury could reasonably infer that the ADL's failure to listen to the intercepted telephone conversations or investigate the matter before holding a press conference to denounce plaintiffs as anti-Semites amounted to reckless disregard of the falsity of the matters it publicized, especially when the ADL recognized the catastrophic impact that public allegations of anti-Semitism might have on Mr. Quigley's career. In that respect, Rosenthal's conduct could be perceived as even more egregious, given his awareness of the stigmatizing consequences attached to accusations of anti-Semitism. Rosenthal's memorandum to Towbin further supports an inference that the ADL was more concerned with generating publicity about the allegations leveled at plaintiffs than it was about the truthfulness of those allegations. In sum, there is adequate evidence to support a finding that the ADL's primary objective to expose publically plaintiffs as anti-Semitic was made with indifference to whether, in fact, plaintiffs' remarks were anti-Semitic.

Finally, defendants' contention that they are entitled to judgment as a matter of law because Rosenthal's

defamatory statements were substantially true rests on defendants' perception of the facts. Defendants' contention, however, overlooks the standard of review I must follow when deciding a motion for judgment as a matter of law. Whether Rosenthal's statements were substantially true necessarily depends upon the context in which those statements were made. This was a matter for the jury to decide and I am not inclined to disturb the jury's conclusion. *Deteres* [sic], 202 F.3d at 1269. Moreover, even if were to undertake a *de novo* review of Rosenthal's statements, as defendants now urge me to do, I find that the record as a whole supports a finding that, given the context in which they were made, Rosenthal's statements were not substantially true.

c. Punitive Damages Under the Federal Wiretap Act

The jury awarded plaintiffs a combined $7.5 million in punitive damages on plaintiffs' claim that the ADL violated 18 U.S.C.A. § 2511(1)(d) when Lozow and Kritzer, while acting as the ADL's agents and/or co-conspirators, unlawfully used plaintiffs' intercepted telephone calls to prepare and file the Aronsons' complaint against plaintiffs. The ADL argues that the jury's award should be set aside because. (1) there is insufficient evidence to support a finding that ADL acted with the requisite level of culpability for an award of punitive damages; (2) the ADL cannot be held liable for punitive damages based on the unlawful conduct of its agents; (3) the ADL's violation of the Federal Wiretap Act was *de minimis*; and (4) the award is unconstitutionally excessive, in violation of the ADL's due process rights. (Defs.' Am. Dr. at 9-18.)

i. Evidence of Wanton, Reckless, or Malicious Conduct

Although the Federal Wiretap Act allows for the award of punitive damages "in appropriate cases," *see* 18 U.S.C.A. § 2520(b)(2), the statute provides no guidance for determining what is an appropriate case. Several courts interpreting the statute, however, have held that to receive punitive damages a plaintiff must demonstrate that the defendant acted "wantonly, recklessly, or maliciously." *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978) (citing *Halpern v. Kissinger*, 434 F. Supp. 1193, 1195 (D.D.C. 1977); *Shaver v. Shaver*, 799 F. Supp. 576, 580 (E.D.N.C. 1992); *Campiti v. Walonis*, 467 F. Supp. 464 (D. Mass. 1979). The ADL contends that the [sic] there is insufficient evidence to support the jury's finding that Lozow and Kritzer, while purportedly functioning as the ADL's agents or co-conspirators, acted wantonly, recklessly, or maliciously. (Defs.' Am. Br. at 10.) Specifically, the ADL contends, Lozow and Kritzer's good faith belief that it was legal to intercept cordless telephone calls precludes the award of punitive damages. (*Id.*)

I disagree. Although evidence that a defendant believed he was acting lawfully is pertinent to a determination of whether he acted with the sufficient state of mind to make the award of punitive damages appropriate, I do not find it to be dispositive of the issue. Rather, it is one of several factors for the jury to weigh in its consideration of whether to award punitive damages. *See Shaver*, 799 F. Supp. at 580-81 ("The record demonstrates that the defendant mistakenly believed that her actions were lawful. In addition, the record contains no evidence that the defendant's actions were wanton, reckless, or malicious."); *see also Walonis*, 467 F. Supp. at 466 (noting

belief that actions lawful militates against award of punitive damages). Here, the ADL focuses exclusively on the fact that Lozow and Kritzer believed that the interception of cordless telephone calls was lawful based upon Lozow and Kornfeld's research as well as the representations of Pautler and Thomas. What the ADL ignores, however, is evidence concerning the "use" of the intercepted telephone calls. Kritzer was the lead attorney in preparing the Aronsons' complaint. This position enabled him to select which intercepted comments to include in the amended complaint and the context in which they would appear. Kritzer also attended two meetings with the Aronsons and the ADL in which it was stated that one of the objectives of all of those in attendance was to publicize what they believed to be plaintiffs' anti-Semitic conduct, despite knowing the potential implications that such a public disclosure could have on Mr. Quigley's career. The jury could reasonably infer that, in furtherance of this objective, Kritzer selected only isolated snippets of the hours of illegally taped conversations to frame the Aronsons' complaint in a light favorable to the ADL's objective of publically touting the Aronsons' complaint as a "major case of anti-Semitism." Furthermore, nothing compelled Kritzer's use of the intercepted telephone conversations in preparing the complaint. On this evidence, the jury could have found by a preponderance of the evidence that Kritzer's action, and by extension the ADL's action, was taken with utter disregard to the serious consequences that would follow allegations of anti-Semitism lodged against plaintiffs.

ii. ADL's Liability for the Reckless Conduct of Its Agents

The ADL next argues that the jury's award of punitive damages on plaintiffs' wiretap claim must be set aside because "[i]n Colorado, the rule has developed that a principal cannot be held liable for the acts of an agent unless it is shown that the principal: (a) authorized or approved the servant's tortious act; (b) approved of or participated in the act; or (c) failed to exercise proper care in the selection of its servants." (Defs.' Am. Br. at 11.) The ADL contends that it cannot be held liable for the $7.5 million punitive damage award based on Lozow and Kritzer's conduct because there is no evidence that the ADL authorized, approved, or participated in Lozow and Kritzer's use of the intercepted conversations of plaintiffs. (*Id.*) Plaintiffs' [sic] contend that the ADL's contention is meritless, especially in light of the standard of review applicable to evidentiary challenges of this nature. (Pls.' Mem. in Opp'n to Defs.' Mot. to Amend or Reduce J., for a New Trial, or for J. as a Matter of Law at 42-43 [filed May 31, 2000] [hereinafter "Pls.' Resp."].)

In support of its argument, the ADL points out that Towbin and Rosenthal testified that the ADL had nothing to do with the preparation of the Aronsons' complaint. (Defs.' Am. Br. at 12.) Other evidence adduced at trial, however, demonstrated that Towbin and other ADL employees were aware of the Aronsons' interception and recording of plaintiffs' telephone conversations. The evidence also demonstrated that ADL employees attended meetings with the Aronsons, Lozow, and Kritzer to discuss the progress of the criminal investigation of plaintiffs as well as how to proceed in a civil action against plaintiffs.

Furthermore, there is evidence that Kritzer advised the ADL that he would contact ADL members to discuss strategy before filing the Aronsons' complaint. Based on this evidence, a jury could reasonably find that, at a minimum, the ADL approved of Kritzer's use of the intercepted telephone conversations in preparing and filing the Aronsons' complaint. Towbin and Rosenthal's testimony to the contrary simply raised a credibility issue for the jury to resolve. I see no reason to disturb the jury's determination. *See Deters*, 202 F.3d at 1269 (citations omitted). Consequently, because I am compelled to draw every reasonable inference in plaintiffs' favor, I conclude that there is sufficient evidence in the record to support a finding that the ADL approved of Lozow and Kritzer's use of the intercepted telephone calls in preparing the Aronsons' complaint.

iii. De Minimis Violation

The ADL argues the damages provision contained in the Federal Wiretap Act vests a court with the discretion to refuse to award damages even if it concludes that there has been a wiretap violation. (Defs.' Am. Br. at 12-14.) The ADL's argument is premised on the language of 18 U.S.C.A. § 2520(c)(2) which provides that "the court *may* assess damages. . . . " According to the ADL, the use of the permissive term "may" rather than the mandatory term "shall" has been interpreted by several courts to mean that a district court has the discretion to determine whether or not to award any damages, including punitive damages. (Defs.' Am. Br. at 12-14.) Because the vast majority of intercepted telephone calls quoted in the Aronsons' complaint were conversations that occurred prior to October 25, 1994, the ADL maintains that the use of four excerpts

from conversations that occurred after October 25, 1994, amounted to a *de minimis* violation of the Federal Wiretap Act. (*Id.*)

As an initial matter, I note that there is no controlling precedent in Tenth Circuit and that there is a split of authority amongst the other circuit courts as to whether a district court has the discretion to refuse to award damages for *de minimis* violations of the Federal Wiretap Act. *Compare Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990) (holding 1986 amendment of 18 U.S.C.A. § 2520(c)(2) to delete the term "shall" and replace it with "may" did not vest district court with discretion to refuse to award damages) *with Nalley v. Nalley*, 53 F.3d 649 652-53 (4th Cir. 1995) (holding term "may" evinces Congress' intent to allow district courts discretion in declining to award damages for *de minimis* violations). Even if I were inclined to follow the line of cases holding that a district court has the discretion to refuse to award damages, I find that a reduction in punitive damages is unwarranted because the ADL's wiretap violation is not *de minimis*

In determining whether a wiretap violation is *de minimis*, courts consider several factors, such as whether the plaintiffs suffered actual damages as a result of the wiretap violation, the degree to which the unlawful wiretapping invades the plaintiff's privacy, and whether an award of damages serves a useful purpose. *See Nalley*, 53 F.3d at 653-54 (affirming district court's refusal to award damages where plaintiffs suffered no financial loss as a result of wiretap violation); *Reynolds v. Spears*, 857 F. Supp. 1341, 1348 (W.D. Ark. 1994) (relying on factors such as no actual damages and minimal invasion of privacy to decline to award damages); *Shaver*, 799 F. Supp. at 580 (relying on minor wiretap violation, financial condition of

defendant, and absence of any useful purpose for imposing damages to justify denial of damages). Here, in contrast to the cases relied upon by the ADL, plaintiffs have come forward with evidence that they suffered substantial actual damages as the result of the ADL's wiretap violation. Furthermore, the inclusion of excerpts of the unlawfully intercepted telephone conversations in the Aronsons' complaint resulted in more than a minimal invasion of plaintiffs' privacy. Indeed, once Kritzer filed the Aronsons' complaint, the contents of plaintiffs' unlawfully intercepted conversations became a matter of public record, which, due in large part to the ADL's promotion of the filing of the Aronsons' case against plaintiffs as "a major case of anti-[S]emitisim," garnered substantial media attention throughout the nation. Finally, I reject the ADL's contention that no useful purpose would be served by awarding plaintiffs' punitive damages. At the very least, the award of the punitive damages would deter the ADL from engaging in this type of conduct in the future.

iv. Excessiveness of Punitive Damages

Finally, the ADL argues that the jury's award of $7.5 million must be set aside because it is unconstitutionally excessive. (Defs.' Am. Br. at 15-18.) In *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), the Supreme Court articulated the standard for determining when an excessive award is unconstitutional. The Court held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that . . . may [be] impose[d]." *Id.* at 574, 116 S. Ct. at 1598. There are three "guideposts" involved in this fair notice

calculus. *Id.* at 575, 116 S. Ct. at 1598. The first, and most important, is the reprehensibility of defendant's conduct. *Id.* at 575, 116 S. Ct. at 1599. The second, is the ratio of the punitive damages awarded to the actual harm inflicted on the plaintiff. *Id.* at 580, 116 S. Ct. at 1601. The third guidepost is a comparison of the punitive damages award with " 'the civil or criminal penalties that could be imposed for comparable misconduct.' " *Id.* at 583, 116 S. Ct. at 1603. Additionally, in analyzing a punitive damages award for excessiveness, the court must consider the goal of deterrence. *Deters*, 202 F.3d at 1272 (citations omitted). The size and wealth of the defendant are relevant factors in this regard. *Id.*

Applying these "guideposts" to the case at bar, I am unpersuaded by the ADL's argument that the jury's award of $7.5 million is unconstitutional. First, there can be no dispute that the ADL had notice that it could be held liable for violating the Federal Wiretap Act. *See* 18 U.S.C.A. § 2520(b)(2). Second, there is sufficient evidence in the record to dispel the ADL's claim that its conduct was not so reprehensible as to justify the jury's award of punitive damages. In considering the reprehensibility of the ADL's conduct, I look to such factors as: (1) whether the ADL's behavior causes physical rather than purely economic harm; (2) whether the ADL's conduct would be unlawful in all states; (3) the degree of intentional conduct; (4) whether the conduct involves affirmative acts rather than omissions; and (5) the vulnerability of the targets of the ADL's conduct. *Continental Trend Res. v. OXY USA, Inc.*, 101 F.3d 634, 637 (10th Cir. 1996).

As applied here, these factors weigh in favor of allowing the jury's award. For example, plaintiffs introduced evidence concerning their emotional damage as well as

Mr. Quigley's economic damages. Plaintiffs also introduced evidence that they began receiving death threats and had to hire security guards following the filing of the Aronsons's complaint and the ADL's public announcement of plaintiffs' alleged anti-Semitic conduct. There is also evidence that, despite the ADL's recognition of the potentially catastrophic implications that public disclosure of Mr. Quigley's alleged anti-Semitic acts would have on his career in the entertainment industry, the ADL nevertheless decided to go forward with its plans to publicize the matter and file a complaint revealing Mr. Quigley's private conversations with his wife. The evidence also supports a reasonable inference that the ADL, acting through Kritzer, falsely portrayed plaintiffs as anti-Semitic in the Aronsons' complaint by selecting only isolated comments from the hundreds, if not thousands, of pages of transcripts of personal and ostensibly private telephone conversations and elevating those comments into serious allegations of Anti-Semitism in what could otherwise be regarded as mere sarcastic, banal, and tasteless remarks uttered in a garden-variety dispute amongst neighbors.

Third, the ratio of the punitive damages awarded to the actual harm inflicted on plaintiffs is within acceptable bounds. The 5-to-1 ratio between punitive damages awarded on plaintiffs' wiretap claim and their compensatory damages is reasonable under the circumstances, especially when taking into account the fact that plaintiffs suffered plausible non-economic damage in addition to Mr. Quigley's economic injury. *See Deters*, 202 F.3d at 1272-73 (noting 6-to-1 ratio offered by defendant as maximum allowable ratio was not bright-line rule and higher rations may be appropriate where "the injury is primarily personal"). Also, I am unpersuaded by the ADL's contention

that Kritzer's inclusion of portions of only four post-October 25, 1994, telephone conversations results in a disproportionate award of punitive damages to actual harm suffered by plaintiffs. The ADL's attempt to slice and dice the harm suffered by plaintiffs into discrete categories is unavailing. As noted above, the use of plaintiffs' unlawfully intercepted telephone conversations to prepare and file the Aronsons' complaint constituted a substantial invasion of plaintiffs' privacy and provided the groundwork for the ADL's subsequent public commentary on plaintiffs' alleged anti-Semitic conduct.

Fourth, the comparison of the punitive damage award with the civil or criminal penalties that could be awarded for comparable misconduct supports the jury's award. The Federal Wiretap Act provides for severe criminal penalties for violations of the statute committed by Kritzer and Lozow and attributed to the ADL, including fines and imprisonment for up to five years. *See* 18 U.S.C.A. § 2511(4)(a). Notwithstanding the ADL's argument that the practical reality of the use of plaintiffs' intercepted telephone calls to prepare and file the Aronsons' complaint would not have amounted to any significant criminal penalty, the criminal provisions contained in the statute "reveal[ ] a congressional intent to make harsh sanctions available for potential violations." *Sanders v. Gardner*, 7 F. Supp. 2d 151, 178 (E.D.N.Y. 1998). Thus, "[e]ven exorbitant punitive damage awards are not inconsistent with these potential penalties." *Id.* (discussing criminal penalties under federal securities law). Moreover, the ADL's reliance on the statutory damages available under the Federal Wiretap Act of "the greater of $100 per day for each day of violation or $10,000," completely ignores the fact that the Federal Wiretap Act allows plaintiffs "to

recover the sum of actual damages suffered." *See* 18 U.S.C.A. § 2520(c)(2)(A)-(B).

Finally, a consideration of the goals of punitive damages – to punish and deter – favors allowing the jury's award to stand. As plaintiffs point out, the ADL is the world leader in fighting Anti-Semitism. Based on its position and history as a well-respected civil-rights institution, it is not unreasonable to infer that public charges of Anti-Semitism leveled by the ADL will be taken seriously and assumed by many to be true without question. In that respect, the ADL is in a unique position of being able to cause substantial harm to individuals when it lends its backing to allegations of anti-Semitism. Thus, the jury's award of punitive damages will, at a minimum, provide a deterrent effect against the ADL from engaging in future conduct involving the use of intercepted telephone conversations to pursue a civil lawsuit against persons perceived to be anti-Semitic.

For the reasons cited above, I conclude that the ADL has not established a proper basis for setting aside the jury's award of punitive damages on plaintiffs' wiretap claim. The increasingly stringent constraints which Congress has imposed on wiretapping and electronic eavesdropping mirror a national consensus that these technologies invasively intrude into deeply private relationships and thoughts. The detailed, restrictive procedures which judges and law enforcement officials must follow in obtaining and issuing wiretap orders reflect an unmistakable amber caution light even when the government uses these technologies to assist in enforcing criminal law. The clear prohibition on private use and the severe criminal and civil penalties for violation thereof is an equally unmistakable stop light. The jury's award of

punitive damages can be viewed as a rational application of this national consensus to the circumstances of this case. Accordingly, defendants' motion to alter or amend the judgment or for judgment as a matter of law with respect to the jury's award of $7.5 million in punitive damages under the Federal Wiretap Act is denied.

d. New Trial or Remittitur

Defendants argue that they are entitled to a new trial on several grounds. (Defs.' Am. Br. at 18-23. As stated above, "'[a] motion for a new trial is not regarded with favor and should only be granted with great caution.'" *Franklin* 981 F.2d at 1171 (10th Cir. 1992) (quoting *United States v. Thornburgh*, 962 F.2d 1438, 1443 (10th Cir. 1992). Generally, courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or substantial justice has not been done. *Hughes*, 967 F. Supp. at 437 (D. Colo. 1996) (citations omitted). A new trial is warranted where, having given full respect to the jury's findings and viewing the entire evidence, the trial judge is left with the "definite and firm conviction that a mistake has been committed." *Anthony*, 808 F. Supp. at 1525 (citations omitted).

i. Passion and Prejudice

Defendants first argue that a new trial is warranted because the jury's award of $1.5 million in compensatory damages and $9 million in punitive damages was the product of impermissible passion and prejudice. (Defs.' Am. Br. at 18.) The Tenth Circuit has held that "absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice,

corruption or other improper cause invaded the trial, the jury's determination of the damages is inviolate." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1168 (10th Cir. 1981) (*en banc*) (citations omitted). Bias, prejudice, or passion can be inferred from excessiveness; however, a verdict will not be set aside unless it [sic] so plainly excessive to suggest that it was the product of such passion or prejudice on the part of the jury. *Id.* (citations omitted). Defendants contend that the jury's verdict was the product of prejudice and animosity towards Rosenthal and the ADL because: (1) there is no evidence to support the jury's award of $900,000 to Mr. Quigley for loss of income or earning capacity; (2) there is no evidence to support the jury's award of punitive damages; and (3) argumentative examination of witnesses by plaintiffs' counsel tainted the jury's decision-making process. (Defs.' Am. Br. at 18-21.)

Although I agree with defendants that the damages award in this case was quite large, I am not left with the firm conviction that it was so excessive as to shock the judicial conscience and create an inference that the jury acted out of bias, passion, or prejudice. With respect to defendants' specific contentions, my review of the record satisfies me that there was sufficient evidence before the jury from which it could have concluded that Mr. Quigley suffered $900,000 in economic damages. In *Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350, 362 (3d Cir. 1998), the Third Circuit succinctly articulated the circumstances under which a plaintiff may recover for future lost earning capacity:

> If [plaintiff] has produced competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him.

> This means that a plaintiff need not, as a prerequisite to recovery, prove that in the near future he will earn less money than he would have but for his injury. Rather a plaintiff must show that his injury has caused a diminution in his ability to earn a living.

Mr. Quigley testified concerning his career both before and after the allegations of anti-Semitism. Mr. Quigley testified that he had achieved considerable success in the film industry – which, according to Mr. Quigley and others, is predominantly Jewish and close-knit – prior to the incidents giving rise to this lawsuit. Mr. Quigley, as well as other witnesses, testified that the allegations of anti-Semitism raised by the Aronsons' and the ADL were highly publicized in the industry trade journals. Mr. Quigley testified that, subsequent to the publication of these allegations, he has been unable to progress in his career path. Mr. Quigley also testified as to the salary discrepancies between his position at the time of the publication of the allegations and other higher-level positions that he was arguably qualified to perform.

In addition to Mr. Quigley's testimony, Patrick Purcell, a veteran of the film industry, testified that the film industry is based upon relationships. Purcell testified that, prior to the publication of Mr. Quigley's alleged anti-Semitic comments, he had an excellent reputation in the film industry, and that following the publication of these allegations, potential employers would no longer consider Mr. Quigley as a viable candidate for employment. Purcell testified that the film industry operates on trust and that the allegations anti-Semitism lodged against Mr. Quigley, even if later proven to be unfounded, would not restore that lost trust.

When considered in a light most favorable to Mr. Quigley, this evidence demonstrates a narrowing of Mr. Quigley's opportunities in the film industry and provides a sufficient basis for the jury to award damages to Mr. Quigley for loss of future earning capacity. It is not unreasonable for the jury to infer from the foregoing testimony that the allegations of anti-Semitism leveled against Mr. Quigley had a permanent effect on his ability to secure employment in a predominantly Jewish industry. I am satisfied that the jury's award of $900,000 in economic damages to Mr. Quigley is a reasoned quantification of his economic loss.

Defendants' next contention that there is no evidence to support the jury's excessive award of punitive damages is simply a rehash of their arguments to set aside the jury's award of punitive damages under the Federal Wiretap Act based on a *de minimis* violation of the statute. Because I have addressed those arguments above, I need not consider them again. My reasons for rejecting defendants' argument to set aside the jury's punitive damage award under the Federal Wiretap Act apply with equal force to defendants' argument for a new trial.

Finally, as to defendants' contention that plaintiffs' counsel's argumentative examination of the witnesses improperly influenced the jury, I note that, in the Tenth Circuit, "'[t]he general rule is that the effect of improper evidence may be remedied by admonishing the jury to disregard it and by withdrawing it from evidence.'" *United States v. Oles*, 994 F.2d 1519, 1524 (10th Cir. 1993) (quoting *United States v. Posey*, 647 F.2d 1048, 1053 [10th Cir. 1981].) In addition to admonishing plaintiffs' counsel (regularly) throughout trial, I instructed the jury during my opening and closing instructions that statements of

counsel do not constitute evidence. I reiterated that the jury was to draw no inference from the manner in which the lawyers worded questions. I find nothing in the record that would cause me to believe that the jury disregarded my instructions.

ii. Inconsistencies in the Verdict

Defendants next argue that they are entitled to a new trial based on inconsistencies in the jury's answers on the Special Verdict Form. (Defs.' Am Br. at 21-23.) As explained by the Tenth Circuit in *Harvey v. General Motors Corp.*, 873 F.2d 1343, 1347 (10th Cir. 1989), the district court's role in reviewing the verdict and the jury's answers to special interrogatories on the verdict form under rule 49(b) of the Federal Rules of Civil Procedure is "to try to reconcile the answers to the case to avoid retrial." If reconciliation of the verdict and the jury's answers to the interrogatories is possible, the court is under a duty to reconcile the two. *Id.* (citations omitted). Thus, "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Id.* (internal quotation marks and citations omitted). Only when the jury verdicts are logically inconsistent is it necessary to grant a new trial. *Id.* (citations omitted).

Defendants first contend that an inconsistency in the jury's finding concerning Mrs. Quigley's defamation claims requires a new trial. (Defs.' Am Br. at 21-22.) Defendants point out that the jury found Rosenthal's statement on the Greg Dobbs Program that "[t]here's slander and defamation, the Quigleys have made up stories and lies about the Aronsons. . . . " was not defamatory and was substantially

true as to Mrs. Quigley. The jury, however, reached the opposite conclusion with respect to a similar statement made by Rosenthal at the December 7, 1994, press conference that "[t]hey [plaintiffs] defamed and slandered the Aronsons to their neighbors. . . . " The jury also found a statement made by Rosenthal on the Greg Dobbs Program to be defamatory as to Mrs. Quigley even though the statement does not mention Mrs. Quigley. Based on these alleged inconsistencies, defendants contend that they are entitled to a new trial.

"The reconciliation of the jury's responses . . . is not merely to one another, but to the entire case." *Harvey*, 873 F.2d at 1348. Given the different phrasing of the defamatory statements at issue, and given the disputed evidence from which the jury needed to decide whether the statement was "truthful," I see no inconsistency. Assuming *arguendo* that the jury's contrary findings concerning Rosenthal's statements at the December 7, 1994, press conference and on the Greg Dobbs Program are indeed inconsistent, I find that this inconsistency does not warrant a new trial. At the most, these alleged inconsistencies amount to harmless error. The jury was instructed that it should consider each publication as whole and not dwell on isolated parts of the statement. When viewed as a whole, there is sufficient evidence in the record to support the jury's ultimate conclusion that Rosenthal's reading of the "Opening Statement" and his comments about plaintiffs on the Greg Dobbs Program were defamatory.

Moreover, I find no merit to defendants' contention that the jury verdict was inconsistent because the jury found that certain statements made by Rosenthal were not substantially true even though they were based upon

comments made by plaintiffs in their intercepted telephone conversations. (Defs.' Am. Br. at 22.) Whether or not Rosenthal's statements were substantially true, however, was a question of fact for the jury to resolve. It is not the province of the court of to weigh the evidence or challenge the factual conclusion of the jury. *Deters*, 202 F.3d at 1268. Accordingly, plaintiffs' motion for a new trial is denied.

iii. Remittitur

As an alternative to a new trial, defendants argue for remittitur. (Defs.' Am. Br. at 24.) Specifically, defendants seek remittitur on the jury's award of $900,000 in economic damages to Mr. Quigley and punitive damages under the Federal Wiretap Act, arguing that these awards should be set aside based upon a lack of evidence. (*Id.*) Defendants' arguments, once again, simply rehash their earlier arguments to set these awards aside. Because, as explained in greater detail above, there is sufficient evidence to support the jury's award, I conclude that remittitur is not appropriate in this case. *See Hughes*, 967 F. Supp. at 437 (discussing standards for granting remittitur). Accordingly, defendants' motion for remittitur is denied.

e. Compensatory and State-Law Punitive Damages

In addition to moving to set aside the jury's award of punitive damages on plaintiffs' federal wiretap claim, defendants move to set aside or reduce the amount of plaintiffs' compensatory damages and state-law punitive

damages for various reasons. I address each of these reasons below.

i. Setoff from Plaintiffs' Settlement with Lozow and Kritzer

The ADL contends that it is entitled to a set off of the jury's compensatory awards to plaintiffs based on plaintiffs' settlement with Lozow and Kritzer. (Defs.' Am. Br. at 25-27.) Specifically, defendants contend that each plaintiff's compensatory damage award must be reduced by $175,000 to reflect the sum paid to each plaintiff by Lozow and Kritzer in their settlement with plaintiffs. (*Id.*) To deny set off, according to the ADL, would result in an impermissible double recovery for plaintiffs. I agree.

It is a fundamental legal principle that an injured party is ordinarily entitled to only one satisfaction for each injury. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1236 (10th Cir. 1988). "When a plaintiff receives an amount from a settling defendant, therefore, it is normally applied as a credit against the amount recovered by the plaintiff from a non-settling defendant, provided both the settlement and the judgment represent common damages." *Id.* (citations omitted). The purpose of the "one satisfaction rule" is to prevent a plaintiff from receiving double compensation for an injury; consequently, the rule applies only where the defendants' conduct resulted in a single injury. *Id.* By contrast, where two or more defendants are responsible for separate injuries, an amount received in settlement from one defendant for one of the injuries may not be used to reduce the liability of the other defendant for the other injury. *Id.* "The critical focus, therefore, must be

whether the jury award compensated the plaintiff for the same injury as the settlements." *Id.* at n.20.

Here, for the purposes of determining compensatory damages, the injury suffered by plaintiffs as the result of the ADL's conduct cannot be separated from that caused by Lozow and Kritzer. Plaintiffs' invasion of privacy and wiretap claims against the ADL involved conduct identical to plaintiffs' invasion of privacy and wiretap claims asserted against Lozow and Kritzer. In fact, plaintiffs' prevailed on their wiretap claim (and most likely their invasion of privacy claim) against the ADL only because the jury concluded that Lozow and Kritzer were acting as agents or co-conspirators of the ADL. But for their previous settlement, the jury would have had to find Lozow and Kritzer liable before it could have imposed vicarious liability on the ADL for Lozow and Kritzer's acts.

My analysis does not change simply because the jury awarded a lump sum compensatory award for plaintiffs' injuries which included plaintiffs' defamation false light claims asserted against Rosenthal and the ADL. As defendants point out, plaintiffs cannot deny that at least a portion of the lump sum award covered damages relating to plaintiffs' wiretap and invasion of privacy claims. Moreover, the jury was specifically instructed not to subtract any amount from its damages award to plaintiffs based on the settlement. Consequently, without a set off, plaintiffs will recover twice – once from Lozow and Kritzer and once from the ADL – for the same injury based upon Lozow's and Kritzer's conduct. The ADL is therefore entitled to a set off of $175,000 in compensatory damages per plaintiff which will be reflected in the judgment.

ii. Sufficiency of Evidence to Support Award of State-Law Punitive Damages

Under Colorado law, punitive damages are available only pursuant to statute. *Gruntmeir v. Mayrath Indus., Inc.*, 841 F.2d 1037, 1040 (10th Cir. 1988) (citing *Kaitz v. District Court*, 650 P.2d 553 [Colo. 1982]). Colo. Rev. Stat. § 13-21-102(1)(a)-(b), in relevant part, provides:

> (1)(a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. . . .
>
> (b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

In order to recover punitive damages, the party requesting them must prove beyond a reasonable doubt that the statutory standards have been met. Colo. Rev. Stat. § 13-25-127(2) (1999); *Juarez v. United Farm Tools, Inc.*, 798 F.2d 1341, 1342 (10th Cir. 1986) (citing *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 [Colo. 1986]). Negligent conduct does not meet the statutory standards and cannot serve as a basis for an award of punitive damages. *Tri-Aspen Constr. Co.*, 714 P.2d at 488. "In cases properly involving punitive damages claims, it is within the province of the jury to determine the proper amount of punitive damages." *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 855

(10th Cir. 1986). "The question of the sufficiency of evidence to justify an award of exemplary damages, however, is a question of law for the court." *Id.* (citing *Mince v. Butters*, 616 P.2d 127, 129 [Colo. 1980]).

In this case, defendants contend that there was insufficient evidence to submit the issue of punitive damages on plaintiffs' state-law claims to the jury. (Defs.' Am. Br. at 27-28.) Defendants contend that there was no evidence that Rosenthal or the ADL acted willfully, wantonly, or recklessly with respect to the conduct at issue in plaintiffs' state-law claims. (*Id.*) At best, defendants argue, the evidence suggested that Rosenthal and ADL did not undertake a proper investigation before making public statements about plaintiffs. (*Id.* at 27.) Defendants, in essence, contend that the evidence supported, at most, a finding that defendants acted negligently in making public statements about plaintiffs.

I disagree. Plaintiffs presented evidence at trial from which the jury could have found that defendants' conduct surpassed mere negligence and amounted to willful and wanton conduct. In particular, I am persuaded by the evidence of defendants' knowledge of the devastating consequences that attach to public accusations of anti-Semitism. As noted numerous times above, the ADL was well aware of the catastrophic implications which publicity of plaintiffs' alleged anti-Semitic acts could have on Mr. Quigley's career. Yet, despite this awareness, the ADL decided to go forward with its objective of publically accusing plaintiffs of anti-Semitism, even though at least one of the Aronsons preferred to handle the matter quietly. Furthermore, Rosenthal, the primary spokesman for the ADL, testified concerning the social stigma that

accompanies accusations of anti-Semitism. Thus, given defendants' prior knowledge of the effect that accusations of anti-Semitism could have on plaintiffs, defendants' decision to publicize plaintiffs' allege anti-Semitism without conducting any investigation supports a finding that defendants acted with reckless disregard to the consequences that would befall plaintiffs once allegations of plaintiffs' anti-Semitism were made public. Accordingly, I conclude that the issue of state-law punitive damages was properly submitted to the jury.

iii. Reduction of Mrs. Quigley's State-Law Punitive Damages

Defendants next contend that Mrs. Quigley's state-law punitive damages award of $750,000 must be reduced to an amount equal to her compensatory damages in order to comply with Colo. Rev. Stat. § 13-21-102(1)(a) (2000), which provides that "[t]he amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." (Defs.' Am. Br. at 28-29.) Mrs. Quigley raises two arguments in response to defendants' contention. First, she argues that the term "amount of actual damages awarded" includes any prejudgment interest that she may be awarded and that, when prejudgment interest is added to her compensatory damages, the sum exceeds $750,000. (Pls.' Resp. at 55-56.) Second, irrespective of prejudgment interest, Mrs. Quigley argues that the one-to-one ratio of compensatory to punitive damages provided for in Colo. Rev. Stat. § 13-21-102(1)(a) should apply on a "per defendant" basis. (*Id.*)

In *James v. Coors Brewing Co.*, 73 F. Supp. 2d 1250, 1254-55 (D. Colo. 1999), Judge Babcock addressed the question of whether prejudgment interest falls within the term "actual damages" for purposes of computing the one-to-one ratio of actual damages to punitive damages. After a detailed analysis of Colorado precedents, Judge Babcock concluded that the term "actual damages" includes an award of prejudgment interest. *Id.* Judge Babcock found that "[p]rejudgment interest is part and parcel of compensatory damages." *Id.* at 1255. Thus, Judge Babcock concluded that prejudgment interest should be assessed before reducing the punitive damage award. *Id.*

Although I find Judge Babcock's reasoning in *James* persuasive and choose to follow it, *James* is not dispositive of Mrs. Quigley's claim that her compensatory damages inclusive of prejudgment interest exceed $750,000. Assuming for the moment that Mrs. Quigley is indeed entitled to prejudgment interest – a matter I take up below – the reduction of Mrs. Quigley's compensatory damages to $325,000 based on her settlement with Lozow and Kritzer requires a recalculation of her prejudgment interest. Calculating Mrs. Quigley's prejudgment interest under Colorado law – the rate more favorable to her – the total of Mrs. Quigley's compensatory damages and prejudgment interest comes to approximately $545,000.[5] Because Mrs. Quigley's recalculated "actual damages" do not exceed $750,000, I must address whether the one-to-one ratio of actual damages to punitive damages applies, as Mrs. Quigley asserts it does, on a "per defendant" basis.

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[5] I note that this calculation is for comparative purposes only and reflects only a rough estimate.

In analyzing Mrs. Quigley's assertion that the one-to-one ratio of actual damages to punitive damages in Colo. Rev. Stat. § 13-21-102(1)(a) applies on a "per defendant" basis, I begin with the language of the statute. *Colorado State Bd. of Med. Exam'rs v. Saddoris*, 825 P.2d 39, 42 (Colo. 1992). When the language of a statute is clear and unambiguous, I apply the statute as written and do not need to employ the interpretive rules of statutory construction. *Sigman v. Seafood Ltd. P'ship*, 817 P.2d 527 (Colo. 1991). Where a statute is unclear, however, and the language lends itself to alternative constructions, it is appropriate to look to the pertinent legislative history in determining which construction is in accordance with the objective sought by the legislature. *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990). Statutes susceptible to more than one interpretation are ambiguous and must be construed in light of their legislative intent and purpose. *Estate of David v. Snelson*, 776 P.2d 813, 817 (Colo. 1989). If the language of the statute is ambiguous, I may consider its legislative history in order to ascertain the legislature's intent. *People v. Davis*, 794 P.2d 159 (Colo. 1990), *cert. denied*, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991). I must construe the statute to further the intent of the legislature as evidence by the entire statutory scheme. *Meyers v. Price*, 842 P.2d 229, 231 (Colo. 1992).

Subsection (1)(a) of Colo. Rev. Stat. § 13-21-102 was amended in 1986 by House Bill 1197 to limit the amount of exemplary damages to the amount of "actual damages awarded." *Lira v. Davis*, 832 P.2d 240, 243 (Colo. 1992). This provision, therefore, mandates a one-to-one limitation of exemplary damages to actual damages awarded. *Id.* When it enacted Colo. Rev. Stat. § 13-21-102(1)(a), however, the Colorado General Assembly did not explicitly

codify when or how the statute's one-to-one limitation of exemplary damages to actual damages would be applied in pro rata liability cases. Because it is plausible that the statutory language lends itself to two rational, yet mutually exclusive, interpretations – the one espoused by Mrs. Quigley and the one espoused by defendants – I look to the statute's legislative history in order to determine the Colorado General Assembly's purpose in enacting Colo. Rev. Stat. § 13-21-102(1)(a). *Terry,* 791 P.2d at 376.

House Bill 1197, ch. 106, sec. 1, § 13-21-102(1)(a), 1986 Colo. Sess. Laws 675, which amended Colo. Rev. Stat. § 13-21-102(1)(a), was part of the sweeping tort-reform legislation of 1986. *See Lira,* 832 P.2d at 245 (citing *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 263 [Colo. 1991]). The purpose of House Bill 1197 was to limit excessive punitive damages awards. *Id.* (citing Hr'gs on H.B. 1197 before the House State Affairs Comm., 55th Gen. Assembly, 2d Sess. [Audio Tape Feb. 4, 1986]). The title of the bill itself, "An Act Concerning the Award of Damages, and Providing for Limitation thereon and for the Disposition Thereof," is indicative of such purpose. *Id.* Additionally, Representative Grant, a sponsor of the bill, stated that its purpose was to "restrict a party's punitive damages to an amount not in excess of actual damages." *Id.* By this bill, he stated, "'we're allowing a *doubling* of the liability . . . against the wrongdoer, over and above and *twice* the amount of actual damages. . . . You are providing a sufficient deterrence, sufficient punishment against that wrongdoing.'" *Id.* (quoting Second Reading of H.B. 1197, 55th Gen. Assembly, 2nd Sess. at 2:14 p.m. [Audio Tape Feb. 26, 1986]) (emphasis supplied). Lastly, Representative Grant stated that: "We're talking about a limitation that is reasonable, appropriate, that I think effectively

doubles the potential liability of a wrongdoing party." *Id.* (quoting Second Reading of H.B. 1197, 55th Gen. Assembly, 2nd Sess. at 2:18 p.m. [Audio Tape Feb. 26, 1986]).

If the exemplary damages are limited to the reduced compensatory damages amount, then the purpose of the bill as articulated by its sponsor would be promoted because a defendant would be responsible for paying a maximum of twice the amount of damages he is determined to owe after reduction for the apportionment of fault. *Id.* at 246. As the court noted in *Lira*, "[s]ince under the comparative negligence and pro rata liability statutes, one of several negligent persons is only responsible for damages in accordance with his determined percentage of fault, that party's liability for punitive damages should be no greater than the amount of actual damages he owes." *Id.* Thus, the aggregate of ADL and Rosenthal's individual liability for punitive damages should be no greater than the actual damages owed collectively by both parties. Mrs. Quigley's application of the statute on a "per defendant" basis could not effectuate such a scheme.

Accordingly, I find that the limitation upon punitive damages established by Colo. Rev. Stat. § 13-21-102(1)(a) requires a reduction of the jury's award to Mrs. Quigley of state law punitive damages against Rosenthal and the ADL so as not to exceed the amount of actual damages awarded.[6] The judgment in this case will therefore reflect

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[6] Mrs. Quigley argues that, in other contexts, the Colorado Supreme Court has applied the "per defendant" basis. In construing Colo. Rev. Stat. § 13-21-102.5, which limits awards of non-economic damages in most circumstances to $250,000, the court held the statute to apply on a "per defendant" basis where that construction was

(Continued on following page)

a reduction of Mrs. Quigley's state-law punitive damages to an amount equal to her "actual damages" of $325,000, plus an award of prejudgment interest if any.[7]

iv. Duplicative Award of State-Law Punitive Damages

The ADL argues that the punitive damages assessed against it under Colo. Rev. Stat. § 13-21-102 are duplicative of those assessed against Rosenthal and therefore should be set aside. (Defs.' Am. Br. at 29-31.) As discussed above, the "single satisfaction rule" precludes a plaintiff from recovering twice for the same injury. *U.S. Indus., Inc.*, 854 F.2d at 1236. Although this rule generally arises most often in the context of compensatory damages, it applies with equal force to punitive damages. *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1459 (10th Cir.

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consistent with the statutory purpose and with the purpose of compensatory damage awards. *General Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994). Because the statutory purpose of Colo. Rev. Stat. § 13-21-102(1)(a), as well as the purpose of exemplary damages, are consistent with my holding today, I find *General Elec.* inapposite.

[7] Despite arguing for a reduction in Mrs. Quigley's state-law punitive damages to an amount equal to her actual damages, defendants do not offer any suggestion as to how this reduction should be apportioned between Rosenthal and the ADL. Although I realize that any effort at apportionment of these damages on the present state of the record will be viewed as arbitrary, I nevertheless find that the reduction in Mrs. Quigley's state-law punitive damages will be as follows: $250,000 the full amount of the ADL's state-law punitive damage liability, will be assessed against the ADL. The remainder of Mrs. Quigley's state-law damages ($325,000 plus prejudgment interest, if any, less $250,000) will be assessed against Rosenthal. Absent guidance from defendants, I believe that this method will best effectuate my holding that Mrs. Quigley is entitled an award of state-law punitive in amount equal to her actual damages.

1997). Where a jury awards duplicative damages a court should reduce the judgment by the amount of duplication. *Id.* (citations omitted). The question of whether damage awards are duplicative is a question of fact. *Id.* (citations omitted).

In this case, the jury assessed a total of $500,000 in state-law punitive damages against the ADL and a total of $1 million in state-law punitive damages against Rosenthal. The ADL contends that, because plaintiffs' state-law claims against Rosenthal and the ADL were based on the same conduct – Rosenthal's statements to the press – the jury's state-law punitive damage award against was [sic] the ADL is duplicative. (Defs.' Am. Br. at 30.) Because the ADL's liability on plaintiffs' defamation and false light invasion of privacy was based purely on a theory of *respondeat superior*, the ADL contends that the jury's assessment of state-law punitive damages against both the ADL and Rosenthal would provide plaintiffs with a double recovery. (*Id.*) Alternatively, the ADL contends that, in the event the jury assessed state-law punitive damages against the ADL solely on plaintiffs' invasion of privacy claim – as opposed to the defamation and false light invasion of privacy claims – the jury's award duplicates its punitive damages award under the Federal Wiretap Act. (*Id.*) In either case, the ADL contends that the jury's award of state-law punitive damages against it must be set aside. I analyze the ADL's contentions in reverse order.

During closing jury instructions, I specifically instructed the jury that it was not to award cumulative damages. The Special Verdict Form reiterated my instruction concerning cumulative damages insofar as it provided: "[a]n award, if any, under this Federal punitive damage claim shall not duplicate any award under the State

punitive damage claim." Generally, the jury is presumed to follow the court's instructions. *United States v. Chanthadara*, 230 F.3d 1237, 1251 (10th Cir. 2000). Applying this presumption, there would be no duplication between the jury's award of state-law and federal-law punitive damages. Thus, under this presumption, the jury's award of state-law punitive damages against the ADL must necessarily be based on plaintiffs' defamation and false light invasion of privacy claims.

Although the jury could have conceivably awarded state-law punitive damages against both Rosenthal and the ADL on plaintiffs' defamation claims, it does not follow that the awards are duplicative. As the Tenth Circuit recognized in *Mason*:

> Punitive damages are not designed to compensate the victim, but to punish and deter conduct of the offending party. In some cases multiple punitive damage awards on overlapping theories of recovery may not be duplicative at all, but may instead represent the jury's proper effort to punish and deter *all* the improper conduct underling the verdict.

Mason, 115 F.3d at 1460 (emphasis in original) (citing *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 383 [8th Cir. 1993]). The jury verdict in this case can be reasonably construed as an effort to punish and deter both Rosenthal and the ADL without being duplicative. *Id.* For example, the jury could have awarded punitive damages against the ADL to punish the ADL based on the December 7, 1994, press conference, while awarding punitive damages against Rosenthal for his statements on the Greg Dobbs Program. The jury could have concluded that the ADL was more culpable for Rosenthal's conduct at the

press conference, given that the press conference occurred at the behest of the ADL and was held at the ADL's Denver office, while Rosenthal's appearance on the Greg Dobbs Program was arguably in a more personal capacity. Alternatively, the jury could have awarded state-law punitive damages against Rosenthal for plaintiffs' false light invasion of privacy claim, while awarding state-law punitive damages against the ADL on the defamation claims – or vice versa. Even though the jury found Rosenthal and the ADL liable for both torts, the torts of false light of invasion of privacy and defamation protect different interests, address different conduct, and require different elements of proof. *See Bueno*, 2000 WL 231993, at *4 (rejecting argument defamation and false light are duplicative and citing *Time, Inc. v. Hill*, 385 U.S. 374, 384-85 n.9, 87 S. Ct. 534, 540-41 n.9 [1967] for proposition that interest protected by defamation is one's reputation whereas interest at stake in false light invasion of privacy is mental distress from public exposure).

In sum, the jury's award of state-law punitive damages can be reconciled with the evidence in this case such that the jury's award of state-law punitive damages against the ADL duplicates neither the jury's award of state-law punitive damages against Rosenthal nor the jury's award of federal-law punitive damages against the ADL. The "duplicative damages" theory provides no basis for remittitur.

v. Charitable Immunity Doctrine

Finally, the ADL argues that all damages against the ADL must be set aside because the charitable immunity doctrine, as defined by Colorado case law and codified in

Colo. Rev. Stat. § 7-123-105 (2000), precludes plaintiffs from collecting damages from the ADL. (Defs.' Am. Br. at 31.) Alternatively, the ADL argues that the court should enter judgement under the express condition that plaintiffs be precluded from executing the judgment on any of the ADL's charitable assets. (*Id.* at 33.) Any judgment entered by the court, according to the ADL, should parallel the language set forth in Colo. Rev. Stat. § 7-123-105.[8] (*Id.*)

Under Colorado law, the charitable immunity doctrine prevents a plaintiff from attaching and executing on the defendant's charitable trust fund to satisfy a tort judgment obtained against the defendant. *Michard v. Myron Stratton Home*, 355 P.2d 1078, 1081-82 (Colo. 1960). The charitable immunity doctrine, however, neither provides immunity from suit or judgment nor provides a defense to a tort action. *Id.* at 1082. Immunity from attachment of trust funds, moreover, "does not come into play until such attachment is attempted." *Id.*

Applying these principles, I conclude that defendants' charitable immunity argument is premature insofar as plaintiffs have yet to attempt attachment of any of the

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[8] Colo. Rev. Stat. § 7-123-105 provides:

> Any other provision of law to the contrary notwithstanding, any civil action permitted under the laws of this state may be brought against any nonprofit corporation, and the assets of any nonprofit corporation that would, but for articles 121 to 137 of this title, be immune from levy and execution on any judgment shall nonetheless be subject to levy and execution to the extent that such nonprofit corporation would be reimbursed by proceeds of liability insurance policies carried by it were judgment levied and executed against its assets.

ADL's assets covered by the charitable immunity doctrine. Furthermore, I see no reason to place a condition in the judgment that tracks the language of Colo. Rev. Stat. § 7-123-105. The protections against levy and execution on charitable assets embodied in Colo. Rev. Stat. § 7-123-105 exist regardless of whether the judgment reflects the language of the statute. Consequently, the judgment in this case will not reflect a [sic] contain language paralleling Colo. Rev. Stat. § 7-123-105.

2. *Plaintiffs' Motion for Prejudgment and Postjudgment Interest*

Plaintiffs move for an award of prejudgment interest and the imposition of postjudgment interest. (Pls.' Mot. for an Award of Prejudgment Interest and an Award of Postjudgment Interest [filed May 11, 2000] [hereinafter "Pls.' Mot. for Interest"].) Specifically, plaintiffs seek: (1) an award of prejudgment on their compensatory damages as calculated under Colorado law; (2) an award of prejudgment on their compensatory damages under federal law if the court finds that plaintiffs are not entitled to prejudgment interest under Colorado law; and (3) the imposition of postjudgment interest, pursuant to 28 U.S.C.A. § 1961(a) (West 1994). (*Id.*) Defendants concede that plaintiffs are entitled to postjudgment interest, but contend that plaintiffs are not entitled to prejudgment interest. (Defs.' Am. Resp. in Opp'n to Pls.' Mot. for an Award of Prejudgment Interest and an Award of Postjudgment Interest [filed Mar. 21, 2001] [hereinafter "Defs.' Am. Resp. to Pls.' Mot. for Interest"].) Defendants contend

that federal law governs the award of prejudgment interest in this case and, under federal law, plaintiffs are not entitled to prejudgment interest.[9] (*Id.* at 2-7.)

Generally, the award of prejudgment interest on claims brought under federal law is controlled by federal law, and the award of prejudgment interest on claims brought under state law is controlled by state law. *U.S. Indus Inc.*, 854 F.2d at 1254-55. Under Colorado law, the award of prejudgment in cases such as this one, where plaintiffs recovered damages for personal injury, is governed by Colo. Rev. Stat. § 13-21-101 (2000). Pursuant to Colo. Rev. Stat. § 13-21-101(1), prejudgment interest is calculated at a statutory rate of nine percent per annum compounded annually. The award of prejudgment interest under this statute is mandatory. *Huffman v. Caterpillar Tractor Co.*, 645 F. Supp. 909, 911 (D. Colo. 1986). In contrast, under federal law, the award of prejudgment interest is not mandatory. *U.S. Indus. Inc.*, 854 F.2d at 1256. Rather, the award of prejudgment interest under federal law is governed by a two-step analysis. *Id.* at 1257. First, the court must determine whether the award of prejudgment interest would serve to compensate the injured party. *Id.* Second, even if an award of prejudgment interest would compensate the injured party, the court must still determine whether the equities would preclude the award of prejudgment interest. *Id.*

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[9] Federal law controls the award of postjudgment interest in federal court regardless of whether the judgment is entered on federal claims or pendent state-law claims. *Mid-American Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1475 (10th Cir. 1992).

The dispute in this case centers on the fact that the jury made a lump-sum award of compensatory damages rather than separate awards for plaintiffs' state-law and federal-law claims. Plaintiffs contend that, as the prevailing parties, they should be allowed to elect which body of law governs the award of prejudgment interest. (Pls.' Mot. for Interest at 9; Pls.' Reply Mem. in Supp. of Their Mot. for an Award of Prejudgment Interest and an Award of Postjudgment Interest at 1-4 [filed June 26, 2000] [hereinafter "Pls.' Reply to Mot. for Interest"].) Because Colorado law provides a more favorable rate of prejudgment of interest, plaintiffs contend that they should be awarded prejudgment interest pursuant to Colo. Rev. Stat. § 13-21-101. (*Id.*) Defendants, of course, disagree with plaintiffs' position and contend that, because the jury did not apportion its award of compensatory damages between plaintiffs' federal-law and state-law claims, federal law governs the determination of whether plaintiffs are entitled to prejudgment interest. (Defs.' Am. Resp. to Mot. for Interest at 2-4.) Defendants further contend that the two-step analysis for awarding prejudgment interests weighs against the award of prejudgment interest. (*Id.* at 4-7.)

Although the Tenth Circuit has not yet addressed the issue raised by the parties, both sides cite authority from other jurisdictions in support of their respective positions. Defendants rely heavily on *Wojtkowski v. Cade*, 725 F.2d 127, 129 (1st Cir. 1984) for the proposition that federal law controls the award of prejudgment interest in this case because the jury did not apportion compensatory damages between plaintiffs' federal and state claims. In *Wojtkowski*, the plaintiff sued the defendants for federal civil-rights violations as well as state-law torts. The district court submitted the plaintiff's claims to the jury together,

resulting in a general verdict in the plaintiff's favor for $6,000. *Id.* The district court denied the plaintiff's post-trial motion for the award of prejudgment under state law, relying on the federal rule that prejudgment interest is a matter for the jury. *Id.* A panel of the First Circuit affirmed the district court's decision on the ground that the general verdict precluded the court from determining to what extent, if any, the jury's award of damages was based on the plaintiff's state-law claims. *Id.* Because the district court could not determine whether the jury awarded damages based on the plaintiff's federal or state claims – or presumably whether the jury found liability on the federal or state claims or both – the panel concluded that the district court was correct in applying federal law. *Id.*

Plaintiffs contend that *Wojtkowski* is inapposite under the facts of this case. Plaintiffs contend that *Wojtkowski* stands for the narrow proposition that, when damages awarded on state-law claims and the damages awarded on federal-law claims differ, federal law governs the award of prejudgment interest, if the jury's verdict does not apportion the otherwise separable damages. (Pls.' Reply to Mot. for Interest at 2.) In support of their contention, plaintiffs' cite several cases distinguishing *Wojtkowski*, including authority from the First Circuit. In *Doty v. Sewall*, 908 F.2d 1053, 1062-63 (1st Cir. 1990), for example, a panel of the First Circuit reversed the district court's denial of prejudgment interest where the jury returned a special verdict finding liability on both federal and state claims but did not apportion damages between the federal and state claims. The panel recognized the principle articulated in *Wojtkowski* that "[o]rdinarily, where the component of state law damages is not clearly discernable, it is appropriate for the district court to consider federal

standards in determining the propriety of prejudgment interest." *Id.* at 1063 (citations omitted). The panel, however, carved out an exception to this rule, holding that, for cases where "the claims under federal and state law, and the damages awarded therefore, are identical a plaintiff is entitled to select the body of law under which the damages will be paid." *Id.* (citations omitted).

In *Arleth v. Freeport-McMoran Oil & Gas Company*, 2 F.3d 630, 636, (5th Cir. 1993), the Fifth Circuit held that the district court erred in relying on *Wojtkowski* in denying the plaintiffs prejudgment interest. There, the jury returned a general verdict with respect to damages on the plaintiffs' claims brought under federal securities law and Delaware common law. *Id.* The Fifth Circuit concluded that *Wojtkowski* was inapplicable because the plaintiffs' damages under all of their claims was the same and held that the plaintiffs were eligible to recover prejudgment under state law. *Id.* The Sixth Circuit reached the same conclusion in *Lilley v. BTM Corporation*, 958 F.2d 746, 755 (6th Cir. 1992), where the jury returned a general verdict of liability under federal and state anti-discrimination laws. Because the plaintiff's federal and state claims "involved substantially identical elements," the court concluded that the plaintiff was entitled to an award of prejudgment interest under state law. *Id.; see also Magee v. U.S. Lines, Inc.* 976 F.2d 821, 823 (2d Cir. 1992) (stating as a general proposition "[i]n such cases, where only a single award of damages, not segregated into separate components, is made, the preferable rule, we think, is that the successful plaintiff be paid under the theory of liability that provides the most complete recovery").

Based on the principles discussed above, I find that this case aligns more closely with the cases cited by plaintiffs than it does with *Wojtkowski*. Although the jury did not apportion plaintiffs compensatory damages, unlike *Wojtkowski*, the Special Verdict Form makes it clear that the jury found liability under both federal and state law. Also, as I stated above in granting defendants a set off with respect to plaintiffs' settlement with Lozow and Kritzer, plaintiffs suffered a single injury for purposes of determining compensatory damages. Moreover, as defendants point out in their opposition to plaintiffs' motion for prejudgment interest, plaintiffs' state-law invasion of privacy claim is based on the same conduct as plaintiffs' claim under the Federal Wiretap Act. Therefore, in this instance, I find that plaintiffs are entitled to elect the body of law that will govern the award of prejudgment interest. Because plaintiffs elect to proceed under Colorado law, and Colorado law mandates that award of prejudgment interest in personal injury cases, I shall grant plaintiff's [sic] motion for prejudgment interest. The judgment will reflect that plaintiffs are entitled to prejudgment interest at a rate of nine percent per annum as provided for in Colo. Rev. Stat. § 13-21-101(1), to accrue from January 18, 1995, until the date judgment is entered.[10]

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[10] Pursuant to Colo. Rev. Stat. § 13-21-101(1), a plaintiff is entitled to prejudgment interest from the date the plaintiff's cause of action accrued. Here, plaintiffs assert that their cause of action against defendants accrued January 18, 1995, the date upon which plaintiffs' first filed counter-claims against defendants. Because defendants do not dispute this date, I shall treat it as the date upon which plaintiffs' claims accrued. Also, because I find that plaintiffs are entitled to prejudgment interest under state law, I need not address plaintiffs'

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3. Plaintiffs' Motion to Treble State-Law Punitive Damages

Apparently unsatisfied with the size of the jury verdict, plaintiffs move to treble the jury's award of state-law punitive damages pursuant to Colo. Rev. Stat. § 13-21-102(3). (Pls.' Mot. to Treble State Law Punitive Damages Awarded Against Def. Anti-Defamation League [filed May 11, 2000] [hereinafter "Pls.' Mot. to Treble Punitive Damages"].) Colo. Rev. Stat. § 13-21-102(3)(a) authorizes a court to increase up to three fold an award of punitive damages where "[t]he defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner . . . during the pendency of the case." Plaintiffs' motion is premised on the singular notion that I am willing to reconsider whether the so-called Foxman-Strassler letter issued by the ADL contains actionable defamatory material. (Pls.' Mot. to Treble Punitive Damages at 4 n.2.) I am not. I have considered this issue at summary judgment and on a motion to reconsider and have ruled against plaintiffs both times. This is, in essence, plaintiffs' third bite at the apple, which is two bites too many. Accordingly, plaintiffs' motion to treble the award of state-law punitive damages awarded against the ADL is denied.

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alternate contention that federal law allows for an award of prejudgment interest in this case.

4. Plaintiffs' Motion For an Order Requiring Defendants to Produce the Summaries Used by Their Counsel During His Closing Argument to the Jury

Three words suffice: "it doesn't matter" – the trial is over. The motion will be denied.[11]

5. Conclusion

Based on the foregoing it is therefore

ORDERED as follows:

1. Defendants' motion to alter or amend the judgment, for a new trial, or for judgment as a matter of law (#423) is GRANTED in part and DENIED in part. Defendants' motion is GRANTED with respect to: (1) each plaintiffs' respective award of compensatory damages, which will be reduced by $175,000, to reflect the monies received by plaintiffs in their settlement with Lozow and Kritzer; and (2) Mrs. Quigley's award of state-law punitive damages, which will be reduced to an amount equal to her compensatory damages of $325,000, plus prejudgment interest on this amount as provided for in Colo. Rev. Stat. § 13-21-101(1). Defendants' motion is DENIED in all other respects.

2. Plaintiffs' motion for prejudgment and postjudgment interest (#420) is GRANTED. The final judgment in this case will reflect that plaintiffs' [sic] are entitled to an

[11] The court is cognizant of plaintiffs' pending motion for an award of attorney fees and litigation costs. That motion is not ripe for resolution at this time.

award of prejudgment interest as provided for in Colo. Rev. Stat. § 13-21-101(1) and postjudgment interest as provided for in 28 U.S.C.A. § 1961(a).

3. Plaintiffs' motion to treble the jury's award of state-law punitive damages against the ADL (#421) is DENIED.

4. Plaintiffs' motion for an order requiring the ADL's counsel to produce summaries used in his closing argument (#430) is DENIED.

5. Defendants' motion to file amended post-trial motions with citations to the record (#450) is GRANTED.

Dated this 30 day of March, 2001.

BY THE COURT:

/s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM J. QUIGLEY; DOROTHY QUIGLEY, Plaintiffs-Appellees, v. SAUL F. ROSENTHAL; ANTI-DEFAMATION LEAGUE, Defendants-Appellants.	No. 01-1228
AMERICAN JEWISH COMMITTEE, et al., Amici Curiae.	

ORDER

Filed August 25, 2003

Before **BRISCOE**, **BALDOCK**, and **HARTZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

The motion for leave to file an amici curiae brief in support of appellants' petition for rehearing en banc, submitted by the American Jewish Committee, the American Jewish Congress, Americans United for Separation of Church and State, the Asian Law Caucus, and the Lambda Legal Defense and Education Fund, is granted.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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18 U.S.C. § 2510 (2003)

§ 2510. Definitions

As used in this chapter –

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than –

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to

prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means –

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" has the meaning given that term in section 3 of the Communications Act of 1934;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include –

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who –

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not –

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means –

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

(19) "foreign intelligence information", for purposes of section 2517(6) of this title, means –

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against –

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to –

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States;

(20) "protected computer" has the meaning set forth in section 1030; and

(21) "computer trespasser" –

(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

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18 U.S.C. § 2511 (2003)

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when –

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service,

whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with –

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or

electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person –

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted –

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which –

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful

interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter –

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if –

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(3) (a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication –

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4) (a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted –

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

[(c) Redesignated (b)]

(5)(a)(i) If the communication is –

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for

purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection –

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

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18 U.S.C. § 2520 (2003)

§ 2520. Recovery of civil damages authorized

(a) In general. – Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United

States, which engaged in that violation such relief as may be appropriate.

(b) Relief. – In an action under this section, appropriate relief includes –

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages. – (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this

section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of –

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense. A good faith reliance on. –

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) or 2511(2)(i) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. – A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(f) Administrative discipline. – If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate

department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) Improper disclosure is violation. – Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94N2782
WILLIAM QUIGLEY and DOROTHY QUIGLEY,
Plaintiffs,

vs.

SAUL F. ROSENTHAL, in his individual capacity and in his capacity as representative of The Anti-Defamation League, and the ANTI-DEFAMATION LEAGUE,
Defendants.

REPORTER'S TRANSCRIPT
TRIAL TO JURY – DAY NINE

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM, Judge, United States District Court for the District of Colorado, and a jury of twelve, continued at 8:41 a.m. on Tuesday, April 18, 2000, in Courtroom C-201, United States Courthouse, Denver, Colorado.

APPEARANCES

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* * *

[2053] THE COURT: All right. The record should reflect it's about 3:25, and we could get in over an hour, close to an hour and a half of testimony this afternoon if we were taking testimony.

The alternative is, I could hear motions for judgment as a matter of law, which I assume there are a few of, at this point in the proceeding. But I think that I could not even possibly hear argument on those motions during this recess. And what I therefore propose to do is to allow the defendants to reserve any and all motions that they might have, and I'm going to ask defendants to proceed with their case at this point on the assumption that the – all claims against both defendants remain in the case at this juncture.

* * *

[2058] So, you know, I suppose we could let the jury go, but I don't know that I'm going to have any answers by 9 o'clock tomorrow, because I doubt that you are prepared to [2059] brief very much of these issues or argue them.

Who is arguing for your side?

MR. JAUDON: Mr. Yun.

THE COURT: Mr. Yun, have you thought these through?

MR. YUN: Yes. Prepared a brief, if you'd like to see it.

THE COURT: I appreciate your preparing a brief. It would have been nice for me to have it at some point. I really need briefing as early in the trial as I can get it.

Do you want to file it?

MR. YUN: Sure.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 2782 (Consolidated with Civil Action No. 95 N 2916 for all purposes)

WILLIAM QUIGLEY and DOROTHY QUIGLEY,

Plaintiffs,

v.

SAUL F. ROSENTHAL, in his individual capacity and in his capacity as representative of The Anti-Defamation League, and the ANTI-DEFAMATION LEAGUE, and LEGAL TEMP, INC., d/b/a ATTORNEYS SERVICE CENTER, INC.,

Defendants.

ANTI-DEFAMATION LEAGUE AND SAUL F. ROSENTHAL'S MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO FED.R.CIV. 50

(Filed Apr. 18, 2000)

Defendants, Anti-Defamation League ("ADL") and Saul F. Rosenthal ("Rosenthal"), by their attorneys, pursuant to Fed.R.Civ.P. 50, move this Court for judgment as a matter of law.

* * *

[17] J. PLAINTIFFS' PUNITIVE DAMAGE CLAIM UNDER THE FEDERAL WIRETAP ACT.

Under 18 U.S.C. § 2520, the Court has discretion to award punitive damages in appropriate cases. Although the statute does not provide any further guidance on when punitive damages are warranted, case law indicates that,

"[i]n order to receive punitive damages under § 2520, [the plaintiff] must show that [the] defendants acted wantonly, recklessly, or maliciously," *Jacobson v.* [18] *Rose*, 592 F.2d 515, 520 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979); *Shaver v. Shaver*, 799 F.Supp. 576, 580 (E.D. N.C. 1992). Where, as here, there is evidence that the defendants believed that they were acting lawfully, the plaintiffs are not entitled to recover punitive damages. *Shaver*, 799 F.Supp. at 580; *Campiti v. Walonis*, 467 F.Supp. 464, 466 (D. Mass. 1979).

In this case, there is no evidence that Aronsons, let alone these Defendants, were aware of the illegality of intercepting cordless telephone conversations with a Radio Shack scanner. To the contrary, law enforcement agencies and attorneys who researched the issue informed the Aronsons that it was not illegal to intercept such conversations. In fact, the Federal Wiretap Act expressly allowed the interception, use, or disclosure of cordless telephone conversations prior to its amendment on October 25, 1994. *Quigley*, 43 F.Supp.2d at 1184. Thus, the Quigleys are not entitled to an award of punitive damages under the Wiretap Act as a matter of law.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94N2782
WILLIAM QUIGLEY and DOROTHY QUIGLEY,
Plaintiffs,

vs.

SAUL F. ROSENTHAL, in his individual capacity and in his capacity as representative of The Anti-Defamation League, and the ANTI-DEFAMATION LEAGUE,
Defendants.

REPORTER'S TRANSCRIPT
TRIAL TO JURY – DAY FOURTEEN

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM, Judge, United States District Court for the District of Colorado, and a jury of twelve, continued at 9:56 a.m. on Wednesday, April 26, 2000, in Courtroom C-201, United States Courthouse, Denver, Colorado.

APPEARANCES

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* * *

[3194] THE COURT: I can't remember whether there is a legal requirement that you make a motion for judgment as a matter of law at the close of all the evidence or not. You know, if your memory is that you need to do that, that's fine. I – I don't have any knowledge.

MR. HOROWITZ: I don't think there is, but we would waive our right to complain that they have not, if there [3195] is –

MR. YUN: If the Court would allow us to just adopt the arguments that were already raised in the motion for summary judgments and – I believe the motion for reconsideration we filed, then we don't have to reiterate the arguments now or any other time.

THE COURT: All right.

* * *

(3)

Supreme Court, U.S.
FILED
JAN 27 2004
OFFICE OF THE CLERK

No. 03-778

IN THE
Supreme Court of the United States

ANTI-DEFAMATION LEAGUE AND
SAUL ROSENTHAL,
Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Counsel for Respondents

January 27, 2004

QUESTIONS PRESENTED

1. Whether, in determining if defamatory statements about non-public figures relate to a "matter of public concern," a court must ignore evidence that the defamatory statements mischaracterized private conversations about a neighborhood dispute and assume the truth of defendant's own interpretation about the dispute.

2. Whether the Federal Wiretap Statute, 18 U.S.C. §§ 2510 *et seq.*, forecloses an award of punitive damages for illegal use of intercepted telephone conversations when one facet of the evidence of wanton, reckless, or malicious conduct is defendants' selective and edited use of those interceptions to defame plaintiffs.

3. Whether sufficient evidence supported an award of punitive damages under the Federal Wiretap Statute against a claim that defendants acted in "good faith" by allegedly obtaining legal advice that intercepting those conversations was lawful.

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INTRODUCTION

This fact-intensive case involves perhaps the most extensive illegal wiretapping scheme litigated under the Federal Wiretap Statute, 18 U.S.C. §§ 2510 *et seq.* After a four-week trial in which it listened to hours of taped intercepted telephone conversations, a jury concluded that petitioners Anti-Defamation League ("ADL") and Saul Rosenthal had maliciously invaded the privacy of respondents William and Dorothy Quigley by orchestrating the unlawful interception and tape-recording of more than 1,200 pages of private telephone conversations. Petitioners then used that material to falsely depict the Quigleys as criminal anti-Semites, committing what the jury found to be an extraordinary number of defamatory statements: 22 separately actionable defamatory statements about Mr. Quigley and 20 about Mrs. Quigley. In findings undisturbed in post-trial motions and on appeal, the jury concluded that petitioners had devised an extensive scheme to distort a dispute between two neighbors – purely private persons who are not public figures – into a cause célèbre intended to promote ADL's own "mission."

Putting aside the striking irony that the jury found ADL liable for defamation, this case involves the application of settled law to a highly unusual set of facts that the court below carefully reviewed, including listening to the tapes of the intercepted calls. Petitioners' effort to transform a private dispute into a "matter of public concern" was properly rejected below and no court has issued a ruling that conflicts with the Tenth Circuit's judgment. Nor does that court's correct application of the Wiretap Statute conflict with the decisions of any other court.

STATEMENT

1. ADL's "Statement" repeats characterizations of the evidence that were expressly rejected by the jury, district court, and court of appeals. The evidence conclusively established ADL's responsibility for vicious defamations and for the illegal interception and use of hundreds of telephone calls. The evidence also decisively proved ADL's

venality in performing those acts. The following statement presents the evidence in the light most favorable to respondents, as this Court is obliged to accept. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985) (Court "must interpret the entire record in the light most favorable" to the prevailing party).

a. In July 1993, Mr. and Mrs. Quigley and their three young children moved to Colorado when Mr. Quigley, a successful executive in the motion picture industry, became an officer of United Artists, at that time a very large chain of movie theatres. They were the first family to move into a new residential development in Evergreen but quickly established friendships with other families who arrived after them. In early August 1994, Mitchell and Candace Aronson moved into a house one door removed from the Quigleys. The Quigleys greeted the Aronsons warmly, their children played together, and the two families had several barbecues together.

In late August 1994, that relationship materially changed, as Mrs. Aronson turned abusive, vicious, and profane in her dealings with Mrs. Quigley. The trouble began after the Aronsons' dog, Bear, viciously attacked and bloodied the Quigleys' dog, Cody. When Mrs. Quigley asked Mrs. Aronson whether Bear had been vaccinated, Mrs. Aronson responded in a tirade, telling Mrs. Quigley that this was "none of your goddamned business," her children were no longer welcome at the Aronsons' house, and Mrs. Quigley was a "bitch." C.A. App. 2104, 2106. Mrs. Aronson ended her salvo with "fuck you." *Id.* at 2107. From that point on, the Aronsons and their children tormented the Quigleys, whose children became afraid to leave their house. The Aronsons permitted Bear to run wild throughout the neighborhood. At one point, Bear pinned Mrs. Quigley against the door of her car. Mrs. Quigley promptly advised Mrs. Aronson that, if there were any further such incidents, she would "call Animal Control," *id.* at 2121, which she did approximately one week later. The animal control officer served a summons

on the Aronsons and, a week later, responded to another complaint from the Quigleys with another summons. The officer warned Mrs. Quigley to expect retaliation.

The Aronsons did indeed retaliate, in particularly ugly fashion. Throughout October 1994, Mrs. Aronson heaped verbal and profane abuse on Mrs. Quigley as she walked the Quigleys' dog in the neighborhood, screaming that Bear should "get those pieces of shit [Mrs. Quigley and her dog]." *Id.* at 2136. The Aronsons' children encouraged a 16-year-old friend to drive an Aronson SUV directly at Colleen, the Quigleys' 9-year-old daughter, and to beat up Brian, their 14-year-old son. On October 18, 1994, the Aronsons drove their SUV directly behind Mrs. Quigley as she walked down the street, with Mrs. Aronson shouting that Mrs. Quigley was a "fat bitch," a "piece of shit," and a "fucking cunt." *Id.* at 2138. Mrs. Aronson then threatened Mrs. Quigley, "you better watch your ass." *Id.* On October 20, Mrs. Aronson positioned her vehicle to block Mr. Quigley from driving down the street. Pet. App. 6a.

On or about November 1, 1994, Deputy District Attorney Mark Pautler sought to meet with the Quigleys concerning a "neighborhood incident" (C.A. App. 1697), which the Quigleys took to mean the road-blocking incident. Initially angry that the Aronsons had apparently made false charges to the local authorities, the Quigleys then welcomed the meeting as an opportunity to express their fears about the Aronsons. Pautler, who told the Quigleys' lawyer that Mrs. Aronson was a "crazy lady," cancelled two appointments for the meeting. *Id.* at 1812. The rest of November 1994 passed uneventfully, although the Quigleys' fear and concern led them, among other things, to ask neighbors to protect their house against attacks by the Aronsons when they took a weekend trip away.

Neither Quigley ever yelled at or assaulted either of the Aronsons. Mrs. Quigley suffered Mrs. Aronson's verbal assaults in silence while walking her dog or collecting her mail. Neither Quigley ever planned or discussed perform-

ing any criminal or tortious act against the Aronsons. Instead, in private conversations the Quigleys discussed "moving away" (C.A. App. 1680, 1705), and Mrs. Quigley nervously, and sometimes pathetically, vented to her friends about the Aronsons' assaults upon her.

On December 6, 1994, a process server arrived at the Quigleys' home to serve a complaint accusing the Quigleys of assaulting the Aronsons because of their Jewish faith. The next day, Mr. Quigley flew back from a business trip to join his family. That afternoon, the Quigleys watched in horror and with complete befuddlement as ADL – an organization they had no reason before then to think had anything to do with the Aronsons – conducted a televised press conference about the Quigleys themselves! At that conference, regional director Rosenthal accused the Quigleys of having perpetrated a "vicious anti-Semitic campaign" against the Aronsons, which included an alleged threat "to commit bodily harm against the Aronsons." *Id.* at 5178-80. Rosenthal also appeared that evening on a talk show for a radio station whose broadcast signal reached 30 states. Explicitly refusing to identify his source, Rosenthal there stated that facts known to ADL proved, without question, that the Quigleys were vicious and criminal anti-Semites. *Id.* at 5181-200.

In the media frenzy that followed, the Quigleys received a barrage of "hate mail," "death threats," "suspicious looking packages," and a "shoe box of dog defecation." *Id.* at 1709, 1840. Friends ostracized them, and they were forced to hire security guards and to change their lifestyles for their own safety.

b. Sometime in the autumn of 1994, the Aronsons began intercepting and tape-recording private telephone conversations over the Quigleys' home telephone.[1] Trial

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[1] The Aronsons asserted, but never proved, that they started intercepting the Quigleys' conversations on October 20, 1994, using a store-purchased radio scanner. Evidence at trial suggested that the Aronsons used an enhanced scanner or a different device altogether, and that the Aronsons started intercepting the Quigleys' private conversa-

evidence disclosed that the Aronsons intercepted and tape-recorded even more than the 260 separate telephone conversations they admitted intercepting. Those conversations involved the immediate Quigley family, as well as the Quigleys conversing with their friends, relatives, neighbors, and their lawyer. A small portion of the conversations concerned the Aronsons' assaultive behavior. The great bulk of the conversations concerned pedestrian matters, although some were of an intimate or private nature, including between the Quigleys as husband and wife and about their children's development. The majority, if not all, of the interceptions were illegal.[2]

In late October 1994, the Aronsons escalated the neighborhood dispute they had launched. They contacted ADL, explaining that they had been intercepting and recording the Quigleys' private telephone conversations and that in those conversations the Quigleys were making anti-Semitic comments.[3] Rosenthal was the director of ADL's regional office, which took the Aronsons' call.

Without questioning or investigating the Aronsons' extraordinary allegations[4] or the background of either fam-

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tions weeks before October 20, 1994. ADL offered no evidence at trial showing that it, or its co-conspirators, ever investigated either point.

[2] On October 7, 1994, Congress passed amendments to the federal wiretap law prohibiting interception of the radio portion of cordless telephone calls which, on October 24th, the President signed into law effective at midnight that night. Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290, 4291.

[3] The jury heard evidence purporting to define "anti-Semitism," including definitions by ADL officers and agents. C.A. App. 4526 (ADL Associate Director Towbin) (anti-Semitism does not include the mere use of derogatory reference to person as Jewish but must involve "prejudice and discrimination against a person because they are Jewish"); *id.* at 3783 (Lozow) ("when a person dislikes somebody else because of what they are doing, not because they are Jewish, then the dislike wouldn't necessarily be anti-Semitism"). None of Mrs. Quigley's comments constituted anti-Semitism under those standards, nor did the isolated comment made by Mr. Quigley, *see* note 13, *infra*.

[4] The Aronsons' fantastic allegations included, for example, a plan by the Quigleys to immolate a child and various plans to assault them.

ily, petitioners blindly adopted the Aronsons' description of the Quigleys' conduct, enlisting active ADL members (and attorneys) Gary Lozow and Stuart Kritzer to help. In early November 1994, to chart a course of action ADL conducted two lengthy meetings attended by several ADL local officers, Lozow, Kritzer and their associates, and the Aronsons. Lozow and Kritzer's strategy had three prongs: (1) to "out" the Quigleys with a massive public relations campaign; (2) to punish the Quigleys by causing the DA to press criminal charges; and (3) to make the Quigleys "suffer economically" through a civil suit.[5]

The plan was to engage in a form of extortion: after persuading the DA to bring criminal charges, the conspirators would file a civil lawsuit and seek to settle it by playing the intercepted tapes for the Quigleys and falsely implying that the DA did not have them. ADL directed the Aronsons to continue intercepting and taping the Quigleys' telephone conversations. The conspirators were keenly aware – and explicitly discussed – the "*potentially catastrophic* implications which publicity of the Quigleys' alleged anti-Semitic acts could have on Mr. Quigley's career," particularly because of Mr. Quigley's employment in what the conspirators knew to be an industry populated

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Many of those allegations stemmed from back-to-back telephone conversations totaling 105 minutes between Mrs. Quigley and Ms. Katie Ughetta on October 20, 1994. The Aronsons produced only an edited five-minute excerpt from the second conversation, less than a minute of which contains speakers engaging in what even one of ADL's witnesses admitted was "venting" and "black humor." C.A. App. 4237-38. Mrs. Quigley explained that the "source" of the comments featured by ADL was radio "shock jock" Howard Stern, who frequently used the imagery of "bars of soap and lamp shades and oven doors" (*id.* at 2178), thus adding to the perversity that ADL had tarred Mrs. Quigley as an anti-Semite for repeating privately the routines that Stern airs publicly.

[5] ADL's trial counsel acknowledged in his opening statement that ADL had "not investigated the matter at all." C.A. App. 1580. Counsel asserted that ADL did not want "to interfere with the normal legal process of the District Attorney's Office." *Id.* The evidence established that ADL itself had initiated and manipulated that DA's process.

with prominent executives of Jewish faith. C.A. App. 5596 (emphasis added).[6]

Between November 7 and December 6, 1994, the Aronsons continued their intercepts, now at the urging of ADL, Kritzer, and Lozow.[7] While ADL "strategized" on an almost "daily basis" (C.A. App. 5179), Lozow and Kritzer transcribed the tapes and parsed the transcripts to concoct "support" for the contrived lawsuit while simultaneously pressuring the DA to pursue criminal charges. In late November and early December 1994, Kritzer and Lozow drafted a civil complaint for the Aronsons to file. On December 5, 1994, they and the Aronsons signed a retainer agreement providing a contingent fee.[8] Early the following morning, the complaint was filed. Shortly thereafter, ADL issued a press advisory entitled, "Major Anti-Semitic Incident Hits Evergreen," which announced a press conference for the following day "about a major case of anti-Semitism and harassment . . . and the lawsuit which has resulted from that case." C.A. App. 5343.[9]

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[6] Thus, in early November 1994, ADL and its co-conspirators casually discussed the unremarkable fact that people of Jewish faith have enjoyed success in the motion picture industry, which has welcomed them and applauded their talent. Perversely, when Mr. Quigley made a virtually identical remark in an intercepted private conversation, ADL depicted the innocuous comment as reflecting Mr. Quigley's virulent anti-Semitism.

[7] ADL has argued that Lozow "researched" the legality of the wiretapping scheme, but the only evidence of that was conflicting testimony by a series of ADL's co-conspirators, all of whom had been sued by the Quigleys, and none of whom produced any corroborating documentary evidence. *See* p. 29, *infra*.

[8] Notwithstanding that retainer agreement, evidence proved that Lozow and Kritzer represented ADL's interests, not the Aronsons'. The Aronsons subsequently filed suit and claimed that Lozow and Kritzer had a conflict of interest that constituted legal malpractice. This charge was validated when ADL helped to fund Kritzer's and Lozow's settlement of the Aronsons' claims and the $350,000 settlement of the Quigleys' claims against them.

[9] By announcing that ADL would hold a press conference the next day, ADL's strategy ensured that newspapers and other media would

At a press conference attended by a crowd of media representatives on December 7, 1994, Rosenthal read a two-and-one-half page document captioned, "Opening Statement," containing many false and scurrilous statements of fact about the Quigleys. C.A. App. 5344-36. Rosenthal reported to the media that the Quigleys had "threatened to commit bodily harm against the Aronson family . . . [by] asking neighbors to help in acquiring hand grenades and dynamite." *Id.* at 5345.[10] He stated that the Quigleys had actually threatened the Aronsons "dozens" of times, engaged in "planning" to set fire to the Aronsons' children and attempted to "harm" the Aronsons physically.[11] He

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cover the story. ADL notes the publication of newspaper stories prior to ADL's press conference (Pet. 2, 8, 18), but fails to acknowledge that ADL had brought the filing of the lawsuit (which was, in any event, a lawsuit manufactured by ADL as "cover" for its campaign to "out" the Quigleys) to the papers' attention. C.A. App. 5343.

[10] It was not difficult for the jury, which evaluated those statements years later, to discern the malicious falsity of that statement in particular. The very neighbors referenced by Rosenthal as the supposed armorers – Claude and Sarah Billings – were people with whom the Aronsons continued to socialize throughout this period without any fear whatsoever. The "source" for this statement was a passing comment made during a lengthy conversation with Mrs. Billings in which Mrs. Quigley mentioned a toy potato gun with which all of the neighbors, including the Aronsons, had played. Lamenting the Aronson situation with Mrs. Billings, Mrs. Quigley laughingly queried whether Mrs. Billings' husband was in the military, and quipped that maybe he could provide hand grenades the Quigleys could then lob into the Aronsons' yard with the toy potato gun. The facetious comments were a momentary diversion in a long, dull talk about neighborhood matters. To portray this comment as Mrs. Quigley seeking to acquire a rocket propelled grenade launcher from an arms dealer might be comical had the portrayal not been so damaging.

[11] Contrary to the repeated assertions of ADL (Pet. 1-2, 12, 17) and its *amici* (Br. 9, 10, 14, 15), none of Rosenthal's more than 20 particularized defamatory statements made reference to the Aronsons' lawsuit. Rosenthal asserted as an unqualified *fact* that the Quigleys performed criminal acts, *not* that it was "alleged," "claimed," or "asserted" by plaintiffs in a civil lawsuit that they had done so. We reproduce the Special Verdict Form "A" setting forth the precise statements found by the jury to be defamatory. *See* App., *infra*, 1a-20a.

later repeated many of those "facts" that evening during a lengthy and widely broadcast radio program. C.A. App. 5181-200; *see* App., *infra*, 10a-20a.

ADL reveled in the immediate and continuing success of its deception. A media frenzy ensued, much like that set off when a celebrity is indicted, as opposed to the complete obscurity that accompanies the filing of a civil lawsuit concerning a neighborhood dispute between two unknown private parties. On December 9, 1994, the district attorney responded to Lozow's proddings, and the publicity generated by ADL, by announcing the filing of multiple criminal charges against the Quigleys. The Quigleys thus faced a purported "civil rights" lawsuit filed in federal court, a state criminal prosecution, and an unrelenting media bombardment fueled by ADL. ADL told its staffers "to make hay while the sun shines" (C.A. App. 5383) by "maximizing all opportunities that are available from the Aronson case" (*id.*) – all to generate publicity for ADL's self-aggrandizement. In late 1994, the Quigleys' priest denounced them from the pulpit.

The DA's Office subsequently acknowledged having no case against the Quigleys. After listening to the tapes of the intercepted conversations, the deputy district attorney concluded that Mrs. Quigley's October 20, 1994 conversation with her friend during which they made references to Holocaust-related matters was "simply 'venting' and 'sick humor.'" Pet. App. 22a. In January 1995, the DA dismissed all charges against the Quigleys except one (a reckless driving charge later resolved with a $300 fine). Later that year, the DA and the Jefferson County Sheriff's Department paid the Quigleys $75,000 to settle civil claims brought by the Quigleys. These public agencies also acknowledged, in two public letters unprecedented in Colorado history, that the county had no "evidence, whether admissible in court or not, proving that Mr. and Mrs. William J. Quigley violated Colorado's laws against ethnic intimidation by engaging in anti-Semitic conduct or harassment or by engaging in any other form of ethnic

intimidation against any other religious or racial group. *Our filing and our prosecution of these charges was a mistake. We have apologized to the Quigleys for that mistake.*" C.A. App. 5221 (emphasis added).[12]

That public apology, however, could not undo the harm suffered by the Quigleys. For months they had cowered in their home in fear of the Aronsons' attacks. But, in December and thereafter, they were publicly and maliciously defamed as the attackers *of* the Aronsons, and attackers motivated by religious bigotry. Due to ADL's campaign, Mr. Quigley forever lost a previously untainted and enviable business career, Mrs. Quigley suffered permanently disabling psychological injury, and the Quigleys' lives, including their children's lives, were totally transformed.

In addition, the Quigleys suffered excruciating humiliation. They had had no idea that, for weeks, their most intimate private thoughts had been monitored by the Aronsons, or that a powerful Jewish organization and its agents had secretly dissected their conversations to build a "case" of "ethnic intimidation." Then, after December 7, 1994, ADL thrust them into a public arena in which Mrs. Quigley's private comments became the fodder for public humiliation through ADL's sound bites (repeated most recently in its certiorari petition) that falsely depict her persona. For his part, Mr. Quigley was completely dumbfounded. Often away on business trips, he had never been a party to his wife's banter with her friends.[13] Under-

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[12] ADL's national director, however, was unrepentant, declaring in an open letter to the press in response to the district attorney's letter that ADL had done the right thing by protecting the Aronsons from "anti-Semites." C.A. Supp. App. 42.

[13] The court below noted that the deputy district attorney concluded that "Mr. Quigley had made no bigoted or racist comments during any of the recorded conversations." Pet. App. 22a. The record reflected only one conversation by Mr. Quigley in which he made any reference even to Judaism, a passing comment about a "Jewish" "old boys' network" in the film industry. *Id.* at 13a (citing C.A. App. 5746). That innocuous comment (which had nothing to do with the Aronsons), was entirely distorted by Rosenthal, who proclaimed without any support

standably, he was astounded to hear Rosenthal catalog to an impressionable public the many criminal "acts" *Mr. Quigley* had committed – all a complete fiction.[14]

2. In January 1995, in response to the "Aronsons'" lawsuit, the Quigleys added Federal Wiretap Statute claims against Rosenthal (later expanded to ADL) and state law claims for defamation and invasion of privacy. In a month-long trial, ADL repeatedly referred to snippets of Mrs. Quigley's taped conversations, which ADL synthesized, for effect, and reproduced on a compact disc. But the jury listened to the entire tapes and read the transcripts. It well perceived that Mrs. Quigley's private venting – in context – stemmed from her frustration and fear at being trapped in a neighborhood where the mere act of walking her dog brought her face to face with a neighbor relentlessly attacking her.[15] ADL also argued to the jury

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that "Mr. Quigley repeatedly has expressed his animus towards individuals of the Jewish faith." *Id.* at 19a; *see also id.* at 18a. The court of appeals observed as well that in only eight of her conversations (which constituted the vast majority of the 260 intercepted and taped) did Mrs. Quigley make any reference to Judaism. *Id.* at 13a.

[14] From its December 7, 1994 defamatory statements to its certiorari petition, ADL has consistently lumped the Quigleys together. ADL baselessly asserts here that "*Respondents discussed burning scarecrows and crosses on the Aronsons' property, throwing soap bars and lamp shades in their yard, taping an oven door to their house*, and otherwise 'taking some type of physical action toward the Aronsons or their home.'" Pet. 2 (quoting Pet. App. 13a) (emphasis added). The italicized words referred to the 40 seconds of almost inaudible banter between Mrs. Quigley and her friend Ms. Ughetta (as they described it themselves during the actual conversations – "sick, sick, sick") on October 20, 1994, which ADL lifted from the lengthy conversations. ADL has never produced any evidence suggesting that Mr. Quigley knew about those statements, let alone was a party to them. ADL simply merges two persons into one and attacks both.

[15] ADL's central defense, that Mrs. Quigley made ugly and occasionally anti-Semitic comments, was largely irrelevant to the Quigleys' claims and did not support any cognizable defense (even ADL's lame assertions that their palpably false statements were "true"). The Quigleys never disputed that Mrs. Quigley made many of the comments attributed to her (although the Quigleys did strongly challenge ADL's characterization of them and ADL's conduct in appropriating, and then

that its "mission" and "importance" justified its wiretapping and publishing of dozens of false and defamatory statements. But the jury understood that an organization like ADL that holds itself out as "venerable" (Pet. 1) is in a unique position to know the devastating impact of branding innocent persons as anti-Semitic. ADL's power and prestige counseled prudence, but the jury saw evidence of gross recklessness. In addition, the jury undoubtedly was impressed by testimony, particularly by the Quigleys' neutral rebuttal witnesses, that firmly established the falsity of the trial testimony of ADL's principal co-conspirators, the Aronsons. Based on that evidence, the jury reached a firm conclusion that, as performed against the Quigleys, ADL's "mission" was a travesty; that ADL was guilty of malicious conduct through its wiretapping and defamations; and that, even under a "beyond a reasonable doubt" standard applied to the state law charges, ADL was guilty of activity that "shocked the conscience."

At an extended conference, the district court rejected nearly all of the Quigleys' proposed instructions and adopted most of petitioners'. And after the instructions were given to the jury, petitioners made no objection. Moreover, at petitioners' request, the district court used a general verdict form for the jury to set forth a single award of compensatory damages on all of the Quigleys' claims and a single and separate award of state punitive damages on those claims. In their post-trial motion, petitioners advanced a range of contentions, none of which it now pursues before this Court.

3. Reflecting its understanding that the district court's rulings on issues of law were fundamentally correct, on appeal ADL principally challenged the sufficiency of the evidence and devised new legal arguments not made at

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altering, these private comments). The Quigleys claimed that ADL had defamed them by stating, falsely and slanderously, that the Quigleys had performed criminal acts, planned to perform other criminal acts, and threatened the Aronsons.

trial. The Tenth Circuit affirmed in substantial part.[16] After a detailed recitation of a number (but by no means all) of the facts that had been adduced at the trial, the court rejected the bulk of petitioners' arguments on various grounds, which often included waiver.[17]

a. The court concluded that, under Colorado law, ADL's defamatory statements "did not involve matters of 'public concern.'" Pet. App. 25a. Explaining that it was undisputed that "the Quigleys were private individuals at the time the alleged defamatory statements were made," *id.* at 27a, the court framed the issue as whether petitioners' statements involved matters of public concern which, under Colorado law, would require the Quigleys to prove actual malice to establish ADL's liability for defamation, *id.* at 27a-28a. The court observed that Colorado law requires that "'the balance should be struck in favor of a private plaintiff if his or her reputation has been injured by a non-media defendant in a purely private context.'" *Id.* at 29a (quoting *Williams v. Continental Airlines, Inc.*, 943 P.2d 10, 17 (Colo. Ct. App. 1996)). Based on its *de novo* review of the entire record, the court concluded that petitioners' defamatory statements concerned an "inherently private" matter. *Id.* at 44a.

As to punitive damages under the Federal Wiretap Statute, the court noted that the district court had instructed the jury to award punitive damages only if petitioners were found to have "acted wantonly, recklessly, or maliciously," *id.* at 46a (internal quotation marks omitted), a standard consistent with the three circuit and multiple district court decisions to have addressed the issue.

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[16] Based on its interpretations of Colorado law and an intervening Colorado Supreme Court decision, the court reversed judgments on the Quigleys' state law invasion of privacy by intrusion and false light invasion of privacy claims, but affirmed the remainder of the judgment.

[17] Each argument raised by petitioners here is a new one not raised below in its current form. We address waiver in the argument sections. Here we briefly summarize aspects of the Tenth Circuit's opinion that touch on petitioners' newly raised claims.

Id. (collecting cases). The court noted that ADL had never challenged the punitive damages instruction.

The court also rejected ADL's argument (presented to, and rejected by, the jury as a factual defense) that the good faith belief of Lozow and Kritzer in the lawfulness of the interceptions prevented the imposition of punitive damages under the statute. The court found ADL's other objections to the award of punitive damages under the statute either to have been waived or to lack merit. Pet. App. 54a-56a.[18]

b. The Tenth Circuit denied petitioners' en banc petition without dissent or recorded vote in favor of rehearing.

REASONS FOR DENYING THE PETITION

ADL raises three new issues not raised or passed on below in their current form. Those new arguments are waived, and, in any event, meritless and fact-bound. No other court has issued a ruling that conflicts with the decision below on the two (of three) issues on which ADL attempts to assert a "conflict."

I. THE "PUBLIC CONCERN" ISSUE DOES NOT WARRANT THIS COURT'S REVIEW

A. ADL's Statements Did Not Involve A Matter Of Public Concern

The Tenth Circuit conducted a *de novo* review of the record – including listening to the tapes – to conclude under Colorado cases that ADL's defamatory statements were not about a matter of public concern. Pet. App. 25a-33a. Even if that decision somehow raised a federal law is-

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[18] Judge Hartz dissented in part. Not focusing upon the critical fact that the Quigleys' comments were private conversations made by private persons, Judge Hartz believed the defamation claim should be vacated. He also stated that the federal statutory punitive damages award should be reversed. The latter opinion was based on an instructional error claim by ADL that the majority rejected and that ADL has now abandoned. Pet. App. 60a-61a. Judge Hartz joined the rest of the majority's opinion.

sue,[19] the court correctly ruled that "it is apparent after listening to those recorded conversations that the Quigleys were engaging in what they thought was *private discussion with each other* or with friends and family regarding their ongoing dispute with the Aronsons." *Id.* at 44a (emphasis added). That determination of the factual context of the Aronson-Quigley dispute was a fundamental predicate to the court's legal conclusion that ADL's defamatory statements about "recorded telephone conversations" concerned "purely private matters." *Id.* at 55a.

The Tenth Circuit's decision correctly applied the principle that the matter of public concern must exist independent of the speech itself. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The courts below made the determination that ADL's speech concerned private matters by assessing the circumstances surrounding ADL's statements. Pet. App. 29a-33a. That record revealed that the Quigleys "did not thrust [themselves] or [their] views into public controversy to influence others," and that the Quigleys' private telephone conversations that ADL falsely portrayed were not about a "particular controversy" of general public interest. *Hutchinson*, 443 U.S. at 135.

In the court below and in its petition (at 16-17), ADL has argued that, because the defamatory statements "as-

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[19] ADL never argued at trial or on appeal that the First Amendment required the Quigleys to prove "actual malice" to support punitive damages for a defamation claim. ADL never cited *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), until its court of appeals brief (at 54), and even then did not do so to contest punitive damages for the state defamation claims. The majority and dissent below agreed that ADL's appeal on defamation implicated only Colorado law. Pet. App. 25a-27a; *id.* at 62a (Hartz, J.). Even in its rehearing en banc petition, ADL argued that, "[l]eft uncorrected, the panel's novel construction of Colorado's public or general concern standard will bind federal courts throughout this Circuit to misapply Colorado law, to the detriment of all Colorado citizens." ADL C.A. En Banc Pet. 8-9. The state law issue here thus merits no further review. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (Court does not review state law issues). And ADL's newfound federal argument has been waived. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

serted that Respondents were engaged in a concerted anti-Semitic campaign of harassment and intimidation," the mere making of this assertion itself elevated ADL's defamations to a matter of public concern. That position, however, was rejected by this Court in *Hutchinson*, which held that a general subject matter – there, the use of public funds – could not be invoked to transform a private matter into a public one. As the Court explained, "[t]he 'use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.'" 443 U.S. at 135 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976)). *See also Connick v. Myers*, 461 U.S. 138, 148 (1983) (private disputes do not involve matter of public concern). As the Court has concluded, "those charged with defamation cannot, by their own conduct, create their own defense." *Hutchinson*, 443 U.S. at 135.[20]

The Tenth Circuit also properly rejected ADL's assertion that its statements concerned a lawsuit. Pet. App. 29a-31a. That defense has no merit. None of the defamatory statements found by the jury referenced the Aronsons' lawsuit, and the lawsuit itself was a concoction by ADL that had no factual predicate and was instituted as a cover for ADL's public smear campaign. *See* App., *infra*, 1a-20a; Pet. App. 42a n.11, 48a-49a. ADL and its *amici* repeatedly characterize the statements as speech about a lawsuit, while never citing or quoting the precise statements found by the jury to be defamatory.[21] In any event,

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[20] The rule advocated by ADL could have harmful policy implications, because it would allow a defendant to create its own privilege through its false statements. Because ADL's "mission" (Pet. 3) is to expose anti-Semites, ADL functionally argues that every false statement it makes to expose such persons is entitled to the heightened requirements of the actual malice standard, regardless of ADL's complete lack of any evidence to support such a claim.

[21] *Compare* Pet. 17 (asserting that ADL's defamatory speech "took two forms: allegations in the Aronsons' civil complaint, which excerpted portions of Respondents' recorded telephone conversations, and

this Court has rejected the notion that "all judicial proceedings [constitute] matters of 'public or general interest.'" *Time, Inc.*, 424 U.S. at 455.

B. The Decision Below Is Not In Conflict With Any Other Decision

To demonstrate its asserted circuit "conflict," ADL must show that three crucial premises underlying its argument are correct: that the Tenth Circuit announced a "*per se*" rule in which public concern status turns on the "truthfulness" of the speech (Pet. 18); that courts in fact have held that the "speech at issue" alone can serve as the basis for establishing that it is about a matter of public concern (*id.*); and that federal decisions in the public employment context create a "conflict" with this defamation case (*id.* at 18-20). Each premise is wrong.

1. The Tenth Circuit did not announce a "*per se*" rule that false speech can never be considered to relate to a matter of public concern. *Compare* Pet. 18 *with* Pet. App. 32a-33a (based on record establishing that ADL was "intimately familiar" with the allegations against the Quigleys, the court held that ADL "knew or should have known" that any assertions "of racial discrimination/harassment were not colorable"). ADL bases its argument on a mischaracterization of two sentences in the Tenth Circuit's opinion. *See* Pet. App. 32a-33a. Properly understood, those sentences reflected the court's indulgence in considering ADL's incorrect argument that its defamatory statements must be assumed to be true in determining "matter of public concern." The court rejected that argument here because evidence showed that ADL's statements are so attenuated from reality that they lack even a "colorable basis" and that ADL itself had concocted the notion of the Quigleys' purported "racial discrimina-

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Petitioners' statements to the press about the lawsuit's allegations") *with* App., *infra*, 1a-20a (jury verdict form showing that none of the defamatory statements found by the jury referenced or quoted the lawsuit's allegations as such.)

tion/harassment." *Id.* at 33a. ADL then took that fabricated accusation, devised a sham lawsuit, and attempted to use the lawsuit as "cover" for its public relations smear campaign. ADL was unable to persuade the jury that there was any truth for its invention charging the Quigleys with ethnic hostility. This Court similarly should not back away from *Hutchinson* to permit ADL to exploit important constitutional rights intended to benefit well-intentioned speakers by affording ADL's malicious invention heightened constitutional protection. *See Hutchinson*, 442 U.S. at 135; *Snead v. Redland Aggregates, Inc.*, 998 F.2d 1325, 1330 (5th Cir. 1993).

2. No decision cited by ADL stands for the proposition that a court must decide, based entirely upon the statements in isolation, whether they are about a matter of public concern. Indeed, it is universally settled that surrounding circumstances matter – the speech has to be "about," "concerning," "involving," or "on" a "matter of public concern."[22] All of the cases cited by ADL address topics of obvious public import, based on the facts and circumstances presented. None of those cases examines the allegedly false statements in isolation, divorced from context, to determine whether they address a matter of public concern.[23] ADL cites no case accepting its far-reaching

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[22] *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 756 (1985) ("a libel that involved a matter of public concern"; "expression on a matter of . . . public concern"; "expression concerned a public issue"); *Gertz*, 418 U.S. at 331 n.4 ("defamatory charge . . . concerned no issue of public or general interest"); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) ("comment on matters of public interest"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44-45 (1971) ("whether the utterance involved concerns an issue of public or general concern").

[23] Indeed, in all of those cases, the courts took into account factors for why the matter at issue was of public concern that went well beyond the employee's statements about it. *See, e.g., Victor v. McElveen*, 150 F.3d 451, 456-57 (5th Cir. 1998) (racial discrimination in police force was matter of public concern in light of existing police policies, assignments of officers, and other external evidence); *Denton v. Morgan*, 136 F.3d 1038 (5th Cir. 1998) (complaints to state education

position that a reviewing court must assume as true the "interpretation" that a speaker offers of an event without regard to the surrounding circumstances. No court has held that, no conflict among the circuits exists on that point, and to adopt that position would conflict with *Hutchinson* and undermine the constitutional balance established in *Gertz*.

3. The "conflict" presented in the cases cited by ADL is unique to public employment law and does not arise in the defamation context, which is why all of the cases (except one) cited by ADL involve public employment speech and not defamation.[24] As *Brasslett* observed, the Supreme Court has "recognize[d] that the government's interest as an employer in regulating employee speech differs from its interest in regulating the speech of the general citizenry." 761 F.2d at 839. In public employee discharge cases, the First Amendment is directly implicated by an employee's speech precisely because that speaker, who typically has "special access to facts relevant to debates on issues of public concern," is being punished by the government. *Johnson*, 48 F.3d at 424. To balance the employee's constitutional rights and the public's interest in information about government operations against the

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agency that a particular detainee was being denied education rights by office managers viewed in context of probation office policies and nature of misconduct alleged); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 574-78 (6th Cir. 1997) (evaluating statements about mismanagement of public funds by examining motive of speaker, possibility of public corruption, timing of allegations that coincided with receipt of public grant funds and fiscal review, and importance of topics to local agency); *Johnson v. Multnomah County*, 48 F.3d 420, 425-26 (9th Cir. 1995) (mismanagement and possible criminal conduct by public official held critical for public concern inquiry); *Brasslett v. Cota*, 761 F.2d 827, 844-45 (1st Cir. 1985) (equipment failures and needs of city's fire department).

[24] ADL contends that the First Amendment inquiry into whether speech addresses a matter of public concern should be the same in all contexts. This Court has never held that, and certainly the plurality opinion cited by ADL stands for no such proposition. Pet. 25 (citing *Dun & Bradstreet*, 472 U.S. at 761 (plurality op.)).

government's need to promote efficiency in its workforce, this Court has devised a test to assess: (1) whether the employee's speech is about a matter of public concern, thereby triggering First Amendment considerations; and (2) if it is, whether the public employer's justifications for taking adverse action are sufficient to overcome the employee's speech interests. *See Pickering*, 391 U.S. at 568.

Thus, the "conflict" cited by ADL concerns merely whether the falsity of the employee's speech is analyzed at the first or second stage of the *Pickering* balancing analysis. ADL quotes (at 18) a snippet from *Johnson*, but omits the remainder of the sentence which states this obvious, albeit crucial, point: "The Circuits appear to be split on whether, in light of *Connick*, recklessly false statements are per se unprotected *or whether the recklessness should be considered as one of the factors in the Pickering balance of interests.*" 48 F.3d at 423 (emphasis added). Some courts hold that falsity of speech can foreclose public concern status; other courts hold that falsity of speech is relevant only in evaluating whether the government is justified in taking adverse action. But at *some* point in the First Amendment analysis in public employment cases, all courts hold that falsity of speech becomes relevant. *See, e.g., id.*; *Denton*, 136 F.3d at 1043; *Brasslett*, 761 F.2d at 844. The only practical significance to the "conflict," therefore, is in whether the government will be forced to justify its adverse action against the employee. This Court appears to have recognized that this is a "conflict" only in the most theoretical sense, because even though the Ninth Circuit in *Johnson* recognized nine years ago the different approaches among the circuits, this Court has not seen fit to address it in light of three subsequent decisions (*Chappel*, *Denton*, and *Victor*) that directly raise the issue where it is relevant – the public employment context. ADL points to no case where the outcomes differed depending on when falsity was factored into the court's analysis.

No matter how that public employment issue ultimately may be resolved, it will have no bearing on how "matter of public concern" is used to gauge whether a defamation defendant is entitled to an actual malice instruction before punitive damages may be awarded. *See Gertz*, 418 U.S. at 349-50. Obviously, in a defamation case where the jury has already found liability, the speech by definition is "false." It would be surpassingly strange for a court – once the jury found a defamation defendant's speech to be false for liability purposes under state law standards – to then require a presumption of truth for that false speech so that the "public concern" issue would be decided under federal law without any reference to any facts other than the words of the defamatory statement. ADL offers no case to support that notion, and the cases it does cite in the public employment context in no way create a "split" with the decision below.[25]

C. This Issue Does Not Warrant Certiorari

Even if ADL's cobbled together "conflict" was relevant here, the "public concern" issue still would not warrant this Court's attention. First, ADL failed to submit a punitive damages instruction for actual malice and it received the instructions it did request. *See* Fed. R. Civ. P. 51. That counsels strongly against further review. *See, e.g.*, *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("[T]here would be considerable prudential objec-

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[25] Nor is there any conflict with *Flamm v. American Ass'n of University Women*, 201 F.3d 144 (2d Cir. 2000), which focused principally on whether a defamatory statement expressed an "opinion" protected by the First Amendment or "facts" susceptible to defamation liability. In *Flamm*, the court held that the speech was about a matter of public concern because it purported to state "facts" about an attorney's ability to serve plaintiffs in discrimination cases. The court there invoked a common law rule that has no application here: "publications commenting on 'persons who present[ ] themselves or their services or goods to the public' are matters of public concern." 201 F.3d at 150. The Quigleys manifestly do not fit within that description.

tion to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested.").

Second, the district court *did* instruct the jury to determine whether ADL had acted with "actual malice" in connection with the Quigleys' state law claim alleging invasion of privacy/false light, which required an instruction identical to what this Court has required for "actual malice": "[Y]ou must find that the defendants had knowledge of or acted in reckless disregard as to the falsity of the matters the defendants publicized about the plaintiff." C.A. App. 5023. *Cf. Gertz*, 418 U.S. at 349 (defining actual malice standard with same terms). The jury had to find that element "by clear and convincing evidence." C.A. App. 5023-24.[26]

Third, overwhelming evidence proved actual malice. Courts have pointed to numerous factors to establish actual malice, nearly all of which were proved by the Quigleys: petitioners' unquestioning acceptance, without any investigation, of the Aronsons' inherently incredible story; petitioners' tarring of Mr. Quigley with no evidence that he had uttered a single ethnically insensitive remark; ADL's knowing decision not to listen to the tapes; and the conscious disregard by Lozow and Kritzer, who did listen to the tapes, of the conversants' own characterization of

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[26] ADL acknowledges this fact (at 11 n.7), notes only that the Tenth Circuit reversed this claim, and omits that the reason the claim was reversed on appeal was because an intervening Colorado Supreme Court decision held that the false light tort "substantially overlaps" with defamation. *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002) (en banc). Significantly, the Colorado court based its ruling in part on the fact that the *scienter* requirement under this tort was identical to the "actual malice" requirement applied in Colorado defamation cases. *See id.* at 899. Thus, when the jury found that all of the elements for false light had been proved, it necessarily found evidence of actual malice to support defamation. The *Denver Publishing* holding, therefore, in no way diminishes the significance of the jury's finding as fact that ADL acted with "actual malice."

their remarks as "sick" and of the obvious bantering tone conveyed by the conversants.[27]

D. The Wiretap Punitive Damages Award Is Unaffected By ADL's "Public Concern" Issue

Recognizing that the punitive damages on the state law defamation claims are but a small fraction of the overall damages award, ADL endeavors to bootstrap its defamation-related matter of public concern contention into an attack upon the federal wiretap punitive damages award. ADL asserts that "the majority affirmed the jury's $7.5 million punitive damages award . . . on a defamation theory – *i.e.*, that ADL 'used the snippets of [intercepted] conversation[s] [in the Aronsons' complaint] to falsely portray the Quigleys as anti-Semitic extremists.'" Pet. 17 (quoting Pet. App. 52a). Not only is that assertion wrong, *see* pp. 27-28, *infra*, but ADL's position would have sweeping and unprecedented consequences if accepted. First, ADL points to no case extending *Gertz* outside the defamation context to require an actual malice instruction before punitive damages may be awarded for causes of action other than defamation. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), this Court suggested the exact opposite approach would apply to claims under the statute, by limiting its extension of First Amendment protection only for innocent disclosures of illegally intercepted conversations

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[27] *See, e.g., Kuhn v. Tribune-Republican Publ'g Co.*, 637 P.2d 315, 317 (Colo. 1981) (evidence of failure to pursue easily available avenues of corroboration); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691-92 (1989) (purposeful avoidance of the truth); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (not reviewing tape recordings); *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1362 (Colo. 1983) (precipitous publication notwithstanding no time pressure); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 158 (1967) (publisher's motive to self-aggrandize or to change its image); *Babb v. Minder*, 806 F.2d 749, 755-56 (7th Cir. 1986) (publishing in the face of evidence of the "great potential for harm" the publication will cause); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (circumstances where the "allegations are . . . inherently improbable" and "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

and reaffirming the statute's purpose of protecting against intrusions on privacy. *See id.* at 525, 540.

Second, ADL's selective editing of the tapes establishes ADL's "wanton, reckless or malicious" state of mind, and does not implicate any First Amendment protections whatsoever. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (upholding penalty enhancement for racially based rape as "content neutral"); *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) ("[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.").

Third, this issue has been waived. ADL raised this issue for the first time in the court of appeals, which noted that it was unclear whether the issue had been raised at trial, and then alternatively and summarily rejected it on the merits. Pet. App. 55a. Although ADL asserts (at 14 n.9) that the court's consideration has preserved the issue for review, that position draws no support from *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (a case in which the court of appeals had "concluded that respondents were entitled to sue"), or *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (rejecting respondent's argument that issue was raised in this Court "for the first time"). In fact, ADL did not object at trial to the punitive damages instructions for failure to instruct on actual malice, and the court of appeals' comments on the point do not cure ADL's failure to timely object. *See Kibbe*, 480 U.S. at 259.

II. THE WIRETAP STATUTE PUNITIVE DAMAGES AWARD IS PROPER

A. ADL's Statutory Challenge Lacks Merit And Is Waived

1. In creating a private right of action for "damages" and "punitive damages" in favor of "any person whose wire, oral, or electronic communication is intercepted, dis-

closed, or intentionally used in violation" of the Federal Wiretap Statute, 18 U.S.C. § 2520(a), (b)(2), the statute nowhere forecloses actual or punitive damages for the tortious "use" of an illegally intercepted communication.[28] That legislative choice is entirely logical. Nearly all "uses" will involve "selectivity," as the defendant parses those portions of the interceptions that suit his purpose. Moreover, the use of intercepted conversations could facilitate theft, fraud, conspiracy to violate antitrust laws, or a host of other civil actions. The intrusion on privacy – the purpose of the statute – is no less implicated because the defendant uses the interceptions to commit an additional tort requiring proof of different elements.[29] Petitioners cite no statutory language or case law preventing respondents from obtaining punitive damages for the malicious use of excerpts from intercepted conversations. Pet. 27-28. The only court to address an issue like the one posed by ADL here has expressly recognized that punitive damages under the statute may be based on use that causes "harm to reputation." *Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001).[30]

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[28] Indeed, the statute expressly provides a safe harbor with limited damages if the offending conduct was "*not* for a tortious or illegal purpose," 18 U.S.C. § 2520(c)(1) (emphasis added), a provision indicating Congress's intent to provide full actual and punitive damages when a violator has such a "tortious or illegal purpose," *see id.* § 2520(c)(2).

[29] ADL's newfound "issue" here also presents a case of invited error. ADL opposed the Quigleys' efforts to try their Wiretap Statute claims before a separate trial would address the defamation claims. By forcing the claims to be tried together, and without requesting any type of limiting instruction, ADL caused the very intermingling of "defamation" with illegal "use" about which it now complains.

[30] Petitioners mischaracterize *Smoot* as upholding the punitive damages award for "defamatory" use "*only* where the party was specifically 'on notice that disclosure . . . was illegal.'" Pet. 28 n.17 (quoting 246 F.3d at 648) (emphasis added). The Sixth Circuit nowhere said that, and indeed clearly treated the use to harm reputation and the knowingly illegal disclosure as "two grounds" for awarding punitive damages. 246 F.3d at 648 (upholding both grounds). Of course, if ADL's construction of the statute had any merit, both grounds would

2. ADL's argument was waived long ago. From the first filing of this lawsuit in January 1995, respondents have complained about ADL's "use" of intercepted conversations in a selective and pernicious manner. Only now does ADL argue that the Federal Wiretap Statute prohibits the award of punitive damages for what ADL characterizes as the "defamatory use" of illegally intercepted communications. Pet. 27. ADL never objected at trial, and its arguments on appeal addressed wholly different constitutional challenges that the Tenth Circuit rejected as waived and/or meritless. Pet. C.A. Br. 53-55.[31] ADL's present argument that, *as a matter of statutory construction*, the statute forecloses punitive damages for "defamatory use" of illegally intercepted communications is therefore waived. This Court does not "pass on" claims that were "neither presented to nor decided by the Court of Appeals below." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 94 n.18 (1989).

B. Substantial Evidence Independent Of "Defamatory Use" Of Illegally Intercepted Conversations Supports Punitive Damages

Even if respondents are somehow precluded from obtaining punitive damages under the Federal Wiretap Statute for "defamatory use,"[32] the award was based on overwhelming evidence of malicious, wanton, or reckless conduct wholly independent of the defamatory use of por-

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have been irrelevant, because a "knowing" violation would no more support punitive damages for defamatory use than a violation without intent. Not only does *Smoot* present no circuit conflict, therefore, it affirmatively supports the Tenth Circuit's judgment below.

[31] The court below noted ADL's failure to raise a due process issue in the district court and that it was unclear whether ADL had raised a First Amendment challenge there. The court nonetheless alternatively rejected those arguments on the merits. Pet. App. 55a-56a & n.17.

[32] Because ADL challenges neither the punitive damages instruction nor the size of the award, neither issue is before the Court. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

tions of the intercepted conversations.[33] In defending the award, respondents may rely "on any ground which the law and the record permit." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 n.12 (1997) (internal quotation marks omitted). Thus, even assuming the court below gave the "wrong reason" (*id.*) for upholding punitive damages – which it did not – the award must nevertheless be upheld as supported by substantial evidence independent of "defamatory use."

Under the concededly correct punitive damages instruction given by the district court, the jury found that ADL acted "wantonly and recklessly" (C.A. App. 5047-48; Pet. App. 53a), a standard that encompasses evidence tending to show ADL's motive and intent, and the nature and seriousness of the injury it caused. That evidence demonstrated: (1) ADL's stated purpose to "out" the Quigleys for no reason other than Mrs. Quigley's private use of language ADL found offensive; (2) ADL's complicity with the Aronsons in continuing the illegal wiretaps; (3) ADL's decision to accuse Mr. Quigley of being an anti-Semitic terrorist, when, in fact, he uttered not one ethnically tinged statement during the multitude of intercepted conversations; (4) ADL's acting with knowledge of the cataclysmic effect its action would have on Mr. Quigley's career, even though it knew he had no involvement in Mrs. Quigley's comments; (5) ADL's development of an extortion plan to trick the Quigleys into paying the Aronsons money through a deception about whether the DA possessed the interceptions; (6) ADL's decision to ensure that news of

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[33] ADL erroneously (at 27-28) contends that the Tenth Circuit limited its affirmance of punitive damages to the "defamatory use" of intercepted snippets. In fact, the court cited additional factors, such as Lozow's and Kritzer's intent to harm the Quigleys. Pet. App. 50a-53a, 56a & n.17. There is no reason for this Court to question that judgment. *See, e.g., International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46 n.7 (1979) (Court "unwilling to substitute our judgment for that of the jury, District Court, and Court of Appeals on" the "essentially evidentiary question" whether there was sufficient evidence "to justify the jury's punitive damages award").

Mr. Quigley's virulent anti-Semitism was published in the two most widely circulated trade journals in Mr. Quigley's industry, to maximize damage to him; (7) ADL's self-aggrandizing desire to "capitalize" on this opportunity to justify its own mission – "to make hay while the sun shines," as Rosenthal instructed his staff; (8) ADL's blatantly false portrayal of the "matter" locally as the most egregious act of anti-Semitism in the Denver area since the tragic murder of Alan Berg; (9) ADL's manipulation of the district attorney into filing baseless criminal charges; (10) ADL's abuse of its stature in attacking powerless people, thereby exacerbating the damages inflicted upon them; and (11) ADL's unrepentant and arrogant defense at trial in which ADL simply repeated its slanders. As the courts below properly concluded, that evidence amply sustained the jury's punitive damages award, given ADL's "conscious disregard" of the Quigleys' privacy interests protected under the Wiretap Statute.

III. ADL'S CLAIM OF "GOOD FAITH" RELIANCE ON LEGAL ADVICE IS WRONG, FACT-BOUND, AND RAISES NO CIRCUIT CONFLICT

A. Overwhelming evidence supported the properly instructed jury's decision to award punitive damages for ADL's "wanton, reckless, or malicious" conduct. Notwithstanding the extended disputes of fact at trial – ADL put on five witnesses to support that defense, and the Quigleys contested the veracity of each one – ADL never claimed below that good faith reliance presented an issue of law, as opposed to a question of fact for the jury to resolve.[34] When the jury assessed punitive damages under

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[34] The court of appeals also properly rejected ADL's "good faith" reliance argument by concluding that ADL never presented any evidence that its lawyers had researched the legality of *using* intercepted conversations, which the court found to be a distinct inquiry from whether an *interception* is legal. Pet. App. 51a-52a & n.15. ADL seeks to blur this issue in the petition, asserting that Lozow's "research" included "interception *and use*." Pet. 25 (citing Pet. App. 12a) (emphasis added); *see also id.* at 7, 26. But in doing so, ADL offers no evidence demonstrating error by the court below. Pet. App. 51a-52a & n.15.

the correct standard,[35] it weighed the substantial evidence that ADL's lawyers had been involved in a scheme to "out" the Quigleys with the intent to destroy Mr. Quigley's career against ADL's dubious protests that they acted in "good faith." Tellingly, by its selection of words to depict its claim, ADL effectively concedes that the issue is factual. Pet. 25-26 ("diligently researched," "consulted with" DA, "implicitly reaffirmed these assurances," "the facts of this case," and "this record" show ADL's "good faith"). And, ADL's exaggerated and inaccurate descriptions of the proof purportedly showing ADL's "acute[] concern[]" about legality and its lawyers taking "great pains" (*id.* at 26) reflect credibility determinations entrusted to a jury that rejected those characterizations. ADL's closing argument of facts to this Court is two courts too late. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. District Dir., INS*, 385 U.S. 630, 635-36 (1967).[36]

B. ADL also asserts (at 27) for the first time in this litigation that the Wiretap Statute forecloses punitive damages "as a matter of law" because of ADL's "good faith." Nothing in the statute – which ADL does not even bother

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[35] Other circuits all uniformly articulate the standard for an award of punitive damages under the Wiretap Statute as whether the defendant's conduct was "wanton, reckless or malicious." *Smoot*, 246 F.3d at 647; *Deal v. Spears*, 980 F.2d 1153, 1159 (8th Cir. 1992); *Bess v. Bess*, 929 F.2d 1332, 1335 (8th Cir. 1991); *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978). ADL has not contested below or here that the jury was properly instructed under that standard. Petitioners imply that the scienter standard is, variously, "willfulness" (Pet. 26 n.16 (citing *Citron v. Citron*, 722 F.2d 14 (2d Cir. 1983) (per curiam))) or "reckless indifference to the requirements of the Act" (*id.* at 26). Those arguments are waived and have no merit. *Citron* addressed a prior version of section 2511, and reached the unremarkable conclusion that punitive damages could not be awarded if the defendant was not liable under the statute.

[36] ADL has waived any objection to the punitive damages instruction. Pet. App. 54a-55a. Considerable evidence apart from the good faith issue supported the punitive damages award. *See* pp. 27-28, *supra*; Pet. App. 51a-53a, 56a n.17.

to cite on this issue – supports its contention. There is no circuit conflict on this issue, nor indeed has ADL cited any case supporting its position. Contrary to ADL's assertion (at 27), *Deal* is consistent with and supports the decision below. In *Deal*, the Eighth Circuit explicitly referred to many factors considered by the district court, of which reliance on legal advice was only one. *See* 980 F.2d at 1159. In the factual context there, the court had no basis for upholding a punitive damages award because the evidence did not support a finding of "wanton, reckless or malicious" conduct. Contrary to ADL's apparent belief (at 27), differences in fact between two court of appeals cases that use the same legal standard do not present a circuit "conflict" warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 27, 2004

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 2782
(Consolidated with Civil Action No. 95 N 2916
for all purposes)

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,
Plaintiffs,

v.

SAUL F. ROSENTHAL, IN HIS INDIVIDUAL CAPACITY AND IN HIS CAPACITY AS REPRESENTATIVE OF THE ANTI-DEFAMATION LEAGUE, AND THE ANTI-DEFAMATION LEAGUE, AND LEGAL-TEMP, INC., D/B/A ATTORNEYS SERVICE CENTER, INC.,
Defendants.

[Filed Apr. 28, 2000]

SPECIAL VERDICT FORM "A"

THE JURY MUST UNANIMOUSLY AGREE ON THE ANSWERS TO ALL OF THE QUESTIONS

I. DEFAMATION CONCERNING STATEMENTS MADE DURING THE PRESS CONFERENCE ON DECEMBER 7, 1994 – WILLIAM QUIGLEY

1. For each of the following statements, please state whether you find by a preponderance of the evidence that the statement was (a) defamatory as to William Quigley and, if so, (b) whether the defendants acted negligently in publishing the statement. If you answered yes to both (a) and (b) for any statement, please state whether defendants have proved by a preponderance of the evidence

whether that statement is substantially true as to William Quigley.

--- Almost immediately upon their arrival they became targets of a[n] . . . anti-Semitic campaign by their neighbors, William and Dorothy, known as Dee, Quigley.

(a) This statement is defamatory as to William Quigley — ___√___ YES ___ NO

(b) This statement was negligently published — ___√___ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES ___√___ NO

--- The purpose of this campaign – which Mrs. Quigley referred to as "Operation Aronson" – was to drive the Aronsons from their new home and neighborhood.

(a) This statement is defamatory as to William Quigley — ___√___ YES ___ NO

(b) This statement was negligently published — ___√___ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES ___√___ NO

--- . . . [W]hat we have here are dozens of instances of attempts to intimidate, threaten and do harm to the Aronsons and to conspire with others in the neighborhood to do the same.

(a) This statement is defamatory as to William Quigley — ___√___ YES ___ NO

(b) This statement was negligently published — ___√___ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES ___√___ NO

--- The Quigleys engaged in all of the following activities, among others.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- They threatened to burn a cross on the Aronson's property, planned to tape a facsimile of an oven door on their home, discussed plans to douse one of the Aronson children with a flammable liquid and to burn a scarecrow on their property.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- They have conspired with each other and others in the neighborhood to involve the homeowners association in driving the Aronsons out.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- They defamed and slandered the Aronsons to their neighbors by attributing false behavior to them.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- And, ultimately, they threatened to commit bodily harm against the Aronson family using the term "blow him away" and asking neighbors to help in acquiring hand grenades and dynamite.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- On one occasion, William Quigley sought to frighten Candice by driving his car at her at high speed while she was parked in her own vehicle. Swerving away at the last second to avoid a collision, Mr. Quigley and his wife later retold the story and bragged about his effort to their friends.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

2. If you answered "yes" to questions (a) and (b) for any one or more of the foregoing statements, and found that defendants did not prove their defense of substantial truth as to each of those statements, then your verdict must be for Mr. Quigley on his claims for defamation by publication of the Opening Statement, and you must find in his favor on this claim and against both defendants by answering "yes" below. Otherwise, you must find against Mr. Quigley on this claim, in which event you must answer "no" below:

We, the jury, find for William Quigley and against Saul F. Rosenthal and the Anti-Defamation League on William Quigley's claim for defamation:

YES: √ NO: ___

II. DEFAMATION CONCERNING STATEMENTS MADE DURING THE PRESS CONFERENCE ON DECEMBER 7, 1994 – DOROTHY QUIGLEY

1. For each of the following statements, please state whether you find by a preponderance of the evidence that the statement was (a) defamatory as to Dorothy Quigley and, if so, (b) whether the defendants acted negligently in publishing the statement. If you answered yes to both (a) and (b) for any statement, please state whether defendants have proved by a preponderance of the evidence whether that statement is substantially true as to Dorothy Quigley.

--- Almost immediately upon their arrival they became targets of a[n] . . . anti-Semitic campaign by their neighbors, William and Dorothy, known as Dee, Quigley.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- The purpose of this campaign – which Mrs. Quigley referred to as "Operation Aronson" – was to drive the Aronsons from their new home and neighborhood.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- . . . [W]hat we have here are dozens of instances of attempts to intimidate, threaten and do harm to the Aronsons and to conspire with others in the neighborhood to do the same.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- The Quigleys engaged in all of the following activities, among others.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- They threatened to burn a cross on the Aronson's property, planned to tape a facsimile of an oven door on their home, discussed plans to douse one of the Aronson children with a flammable liquid and to burn a scarecrow on their property.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- They have conspired with each other and others in the neighborhood to involve the homeowners association in driving the Aronsons out.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- They defamed and slandered the Aronsons to their neighbors by attributing false behavior to them.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- And, ultimately, they threatened to commit bodily harm against the Aronson family using the term "blow him away" and asking neighbors to help in acquiring hand grenades and dynamite.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- On one occasion, William Quigley sought to frighten Candice by driving his car at her at high speed while she was parked in her own vehicle. Swerving away at the last second to avoid a colli-

sion, Mr. Quigley and his wife later retold the story and bragged about his effort to their friends.

(a) This statement is defamatory as to Dorothy Quigley	√ YES	___ NO
(b) This statement was negligently published	√ YES	___ NO
(c) This statement is substantially true as to Dorothy Quigley	___ YES	√ NO

2. If you answered "yes" to questions (a) and (b) for any one or more of the foregoing statements, and found that defendants did not prove their defense of substantial truth as to each of those statements, then your verdict must be for Mrs. Quigley on her claims for defamation by publication of the Opening Statement, and you must find in her favor on this claim and against both defendants by answering "yes" below. Otherwise, you must find against Mrs. Quigley on this claim, in which event you must answer "no" below:

We, the jury, find for Dorothy Quigley and against Saul F. Rosenthal and the Anti-Defamation League on Dorothy Quigley's claim for defamation:

YES: √ NO: ___

III. DEFAMATION CONCERNING STATEMENTS MADE DURING THE GREG DOBBS SHOW ON DECEMBER 7, 1994 – WILLIAM QUIGLEY

1. For each of the following statements, please state whether you find by a preponderance of the evidence that the statement was (a) defamatory as to William Quigley and, if so, (b) whether the defendants acted negligently in publishing the statement. If you answered yes to both (a) and (b) for any statement, please state whether defendants have proved by a preponderance of the evidence whether that statement is substantially true as to William Quigley.

--- . . . [I]n October, the Aronsons became aware that the Quigleys were engaged in, in what I am describing as a campaign of anti-Semitism to try to drive the Aronsons out of the community.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- They were involved in trying to bring other neighbors into this process, conspiring and discussing with them possible violent acts.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- They used intimidation, ethnic intimidation, there was an attempted assault, vehicular assault. Mr. Quigley attempted to drive his car in a reckless manner and nearly struck Mrs. Quigley [sic] sitting in her car in front of her home, and then he bragged about this to Mrs. Quigley and to other people in their circle of confidantes.

(a) This statement is defamatory as to William Quigley	√ YES	___ NO
(b) This statement was negligently published	√ YES	___ NO
(c) This statement is substantially true as to William Quigley	___ YES	√ NO

--- . . . [T]here's slander and defamation, the Quigleys had made up stories and lies about the Aronsons attributing behavior to Mrs. Aronson, uh, uh, and to the family that is simply not true and then spread those lies throughout the community.

(a) This statement is defamatory as to William Quigley	√ YES	___ NO
(b) This statement was negligently published	√ YES	___ NO
(c) This statement is substantially true as to William Quigley	___ YES	√ NO

--- They had plans to uh, to burn a cross on the Aronsons' lawn.

(a) This statement is defamatory as to William Quigley	√ YES	___ NO
(b) This statement was negligently published	√ YES	___ NO
(c) This statement is substantially true as to William Quigley	___ YES	√ NO

--- They had talked about taping up a facsimile of an oven door on the side of the Aronsons' house.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- There had even been a discussion in one of the conversations about dousing one of the Aronson children with a flammable liquid.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- . . . [T]hey have discussed with their neighbors how to acquire weapons, uh, specifically hand grenades and dynamite.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- . . . [T]here are repeated instances that, that, uh, that we have available to us to demonstrate the animus that the Quigleys had towards the Aronsons. They make a lot of negative comments to

their neighbors and to each other about the Jews and the damned Jews.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- Mr. Quigley repeatedly has expressed his animus towards individuals of the Jewish faith, and he even talks about describing his lack of satisfactory career progress as attributable to the superior success of his Jewish colleagues, and he attributes their success to being part of a, of a, a boys network of Jews, who, uh, and I'm reading here a direct quote a little old boys network, you know, if you're Jewish and you give to charities and you get favors back and forth you get further up into the corporate structures.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- [T]his is months of, of efforts on the part of the Quigleys to scheme and plot and plan and bring a variety of neighbors into the process and to drive a car at someone to try and frighten them and to nearly crash into them and to talk about dousing their kids and calling the police and, and putting false charges out there that the Quigleys, that that the Aronsons are doing one thing or another that is absolutely false.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- . . . [T]he Aronsons have been concerned about the safety of their kids and, you know, have not permitted the kids the kind of freedom to go about doing what, what teenagers would normally want to be doing at this point in their life, because they're just concerned about the extent to which the Aronsons [sic] might do them, might do them bodily harm.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

--- The Aronsons haven't down [sic] anything, they simply moved into the house, and within weeks thereafter the Quigleys started this effort to get them thrown out of the neighborhood because they didn't want, as they referred to them, I can't even use the word because it's the "f" word, those "f" Jews in their community.

(a) This statement is defamatory as to William Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to William Quigley — ___ YES √ NO

2. If you answered "yes" to questions (a) and (b) for any one or more of the foregoing statements, and found that defendants did not prove their defense of substantial truth as to each of those statements, then your verdict must be for Mr. Quigley on his claims for defamation by publication of the statements made during the Greg Dobbs show, and you must find in his favor on this claim and against both defendants by answering "yes" below. Otherwise, you must find against Mr. Quigley on this claim, in which event you must answer "no" below:

We, the jury, find for William Quigley and against Saul F. Rosenthal and the Anti-Defamation League on William Quigley's claim for defamation:

YES: √ NO: ___

IV. DEFAMATION CONCERNING STATEMENTS MADE DURING THE GREG DOBBS SHOW ON DECEMBER 7, 1994 – DOROTHY QUIGLEY

1. For each of the following statements, please state whether you find by a preponderance of the evidence that the statement was (a) defamatory as to Dorothy Quigley and, if so, (b) whether the defendants acted negligently in publishing the statement. If you answered yes to both (a) and (b) for any statement, please state whether defendants have proved by a preponderance of the evidence whether that statement is substantially true as to Dorothy Quigley.

--- . . . [I]n October, the Aronsons became aware that the Quigleys were engaged in, in, what I am describing as a campaign of anti-Semitism to try to drive the Aronsons out of the community.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- They were involved in trying to bring other neighbors into this process, conspiring and discussing with them possible violent acts.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- They used intimidation, ethnic intimidation, there was an attempted assault, vehicular assault. Mr. Quigley attempted to drive his car in a reckless manger and nearly struck Mrs. Quigley [sic] sitting in her car in front of her home, and then he bragged about this to Mrs. Quigley and to other people in their circle of confidantes.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- . . . [T]here's slander and defamation, the Quigleys had made up stories and lies about the Aronsons attributing behavior to Mrs. Aronson, uh, uh, and to the family that is simply not true and then spread those lies throughout the community.

(a) This statement is defamatory as to Dorothy Quigley — ___ YES √ NO

(b) This statement was negligently published — ___ YES √ NO

(c) This statement is substantially true as to Dorothy Quigley — √ YES ___ NO

--- They had plans to uh, to burn a cross on the Aronsons' lawn.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- They had talked about taping up a facsimile of an oven door on the side of the Aronsons' house.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — •√ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- There had even been a discussion in one of the conversations about dousing one of the Aronson children with a flammable liquid.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- . . . [T]hey have discussed with their neighbors how to acquire weapons, uh, specifically hand grenades and dynamite.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- . . . [T]here are repeated instances that, that, uh, that we have available to us to demonstrate the animus that the Quigleys had towards the Aronsons. They make a lot of negative comments to

their neighbors and to each other about the Jews and the damned Jews.

(a) This statement is defamatory as to Dorothy Quigley ___ YES _√_ NO

(b) This statement was negligently published ___ YES _√_ NO

(c) This statement is substantially true as to Dorothy Quigley _√_ YES ___ NO

--- Mr. Quigley repeatedly has expressed his animus towards individuals of the Jewish faith, and he even talks about describing his lack of satisfactory career progress as attributable to the superior success of his Jewish colleagues, and he attributes their success to being part of a, of a, a boys network of Jews, who, uh, and I'm reading here a direct quote a little old boys network, you know, if you're Jewish and you give to charities and you get favors back and forth you get further up into the corporate structures.

(a) This statement is defamatory as to Dorothy Quigley _√_ YES ___ NO

(b) This statement was negligently published _√_ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley ___ YES _√_ NO

--- [T]his is months of efforts on the part of the Quigleys to scheme and plot and plan and bring a variety of neighbors into the process and to drive a car at someone to try and frighten them and to nearly crash into them and to talk about dousing their kids and calling the police and, and putting false charges out there that the Quigleys, that that the Aronsons are doing one thing or another that is absolutely false.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- . . . [T]he Aronsons have been concerned about the safety of their kids and, you know, have not permitted the kids the kind of freedom to go about doing what, what teenagers would normally want to be doing at this point in their life, because they're just concerned about the extent to which the Aronsons [sic] might do them, might do them bodily harm.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

--- The Aronsons haven't down [sic] anything, they simply moved into the house, and within weeks thereafter the Quigleys started this effort to get them thrown out of the neighborhood because they didn't want, as they referred to them, I can't even use the word because it's the "f" word, those "f" Jews in their community.

(a) This statement is defamatory as to Dorothy Quigley — √ YES ___ NO

(b) This statement was negligently published — √ YES ___ NO

(c) This statement is substantially true as to Dorothy Quigley — ___ YES √ NO

2. If you answered "yes" to questions (a) and (b) for any one or more of the foregoing statements, and found that defendants did not prove their defense of substantial truth as to each of those statements, then your verdict must be for Mrs. Quigley on her claims for defamation by publication of the statements made during the Greg Dobbs show, and you must find in her favor on this claim and against both defendants by answering "yes" below. Otherwise, you must find against Mrs. Quigley on this claim, in which event you must answer "no" below:

We, the jury, find for Dorothy Quigley and against Saul F. Rosenthal and the Anti-Defamation League on Dorothy Quigley's claim for defamation.

YES: √ NO: ___

V. FALSE LIGHT INVASION OF PRIVACY – WILLIAM QUIGLEY

1. Did the plaintiff William Quigley, prove each and every element of his claim of false light invasion of privacy against the defendants, the Anti-Defamation League and Saul F. Rosenthal?

ANSWER: YES (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mr. Quigley on his claims of False Light Invasion of Privacy, and you must find in his favor on this claim and against both defendants by answering "yes" below. Otherwise, you must find against Mr. Quigley on this claim, in which case you must answer "no" below:

We, the jury, find for William Quigley and against Saul F. Rosenthal and the Anti-Defamation League on William Quigley's claim of False Light Invasion of Privacy.

YES: √ NO: ___

VI. FALSE LIGHT INVASION OF PRIVACY – DOROTHY QUIGLEY

1. Did the plaintiff Dorothy Quigley, prove each and every element of her claim of false light invasion of privacy against the defendants, the Anti-Defamation League and Saul F. Rosenthal?

ANSWER: YES (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mrs. Quigley on her claim of False Light Invasion of Privacy, and you must find in her favor on this claim and against both defendants by answering "yes" below. Otherwise, you must find against

Mrs. Quigley on this claim, in which case you must answer "no" below:

> We, the jury, find for Dorothy Quigley and against Saul F. Rosenthal and the Anti-Defamation League on William Quigley's claim of False Light Invasion of Privacy.
>
> YES: √ NO: ___

VII. INVASION OF PRIVACY – WILLIAM QUIGLEY

1. Did the plaintiff, William Quigley, prove each and every element of his claim of invasion of privacy against the defendant, the Anti-Defamation League?

ANSWER: YES (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mr. Quigley on his claim of Invasion of Privacy, and you must find in his favor on this claim and against defendant Anti-Defamation League by answering "yes" below. Otherwise, you must find against Mr. Quigley on this claim, in which case you must answer "no" below:

> We, the jury, find for William Quigley and against the Anti-Defamation League on his claim of Invasion of Privacy.
>
> YES: √ NO: ___

VIII. INVASION OF PRIVACY – DOROTHY QUIGLEY

1. Did the plaintiff, Dorothy Quigley, prove each and every element of her claim of invasion of privacy against the defendant, the Anti-Defamation League?

ANSWER: YES (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mrs. Quigley on her claim of Invasion of Privacy, and you must find in her favor on this claim and against defendant Anti-Defamation League by answering "yes" below. Otherwise, you must find against Mrs. Quigley on this claim, in which case you must answer "no" below:

> We, the jury, find for Dorothy Quigley and against the Anti-Defamation League on her claim of Invasion of Privacy.
>
> YES: √ NO: ___

IX. FEDERAL WIRETAP ACT FOR "PROCURING" THE INTERCEPTION OF CORDLESS TELEPHONE CONVERSATIONS – WILLIAM QUIGLEY

1. Did the plaintiff, William Quigley, prove each and every element of his claim that the defendant, the Anti-Defamation League, "procured" the interception of his cordless telephone conversations on or after October 25, 1994 in violation of the Federal Wiretap Act?

ANSWER: NO (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mr. Quigley on his claim of violation of the Federal Wiretap Act for "procuring" the interception of the plaintiff's cordless telephone conversations on or after October 25, 1994, and you must find in his favor on this claim and against defendant Anti-Defamation League by answering "yes" below. Otherwise, you must find against Mr. Quigley on this claim, in which event you must answer "no" below:

> We, the jury, find for William Quigley and against the Anti-Defamation League on his claim of violation of

the Federal Wiretap Act for "procuring" the interception of his cordless telephone conversations on or after October 25, 1994.

YES:___ NO:√

X. FEDERAL WIRETAP ACT FOR "USING" THE INTERCEPTED CORDLESS TELEPHONE CONVERSATIONS – WILLIAM QUIGLEY

1. Did the plaintiff, William Quigley, prove each and every element of his claim that the defendant, the Anti-Defamation League, "used" the contents of his cordless telephone conversations intercepted on or after October 25, 1994 to file the Verified Complaint in violation of the Federal Wiretap Act?

ANSWER: YES (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mr. Quigley on his claim that the defendant, the Anti-Defamation League, "used" the contents of his cordless telephone conversations intercepted on or after October 25, 1994 to file the Verified Complaint in violation of the Federal Wiretap Act, and you must find in his favor on this claim and against defendant Anti-Defamation League by answering "yes" below. Otherwise, you must find against Mr. Quigley on this claim, in which event you must answer "no" below:

We, the jury, find for William Quigley and against the Anti-Defamation League on the claim that the defendant, the Anti-Defamation League, "used" the contents of his cordless telephone conversations intercepted on or after October 25, 1994 to file the Verified Complaint in violation of the Federal Wiretap Act.

YES:√ NO:___

XI. FEDERAL WIRETAP ACT FOR "PROCURING" THE INTERCEPTION OF CORDLESS TELEPHONE CONVERSATIONS – DOROTHY QUIGLEY

1. Did the plaintiff, Dorothy Quigley, prove each and every element of her claim that the defendant, the Anti-Defamation League, "procured" the interception of her cordless telephone conversations on or after October 25, 1994 in violation of the Federal Wiretap Act?

ANSWER: NO (yes or no)

2. If you answered "yes" to the question above then your verdict must be for Mrs. Quigley on her claim of violation of the Federal Wiretap Act for "procuring" the interception of her cordless telephone conversations on or after October 25, 1994, and you must find in her favor on this claim and against defendant Anti-Defamation League by answering "yes" below. Otherwise, you must find against Mrs. Quigley on this claim, in which event you must answer "no" below:

> We, the jury, find for Dorothy Quigley and against the Anti-Defamation League on her claim of violation of the Federal Wiretap Act for "procuring" the interception of her cordless telephone conversations on or after October 25, 1994.
>
> YES:___ NO:√

Supreme Court, U.S.
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(4)

No. 03-778

In The Supreme Court of the United States

THE ANTI-DEFAMATION LEAGUE AND SAUL ROSENTHAL,

Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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February 9, 2004

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QUESTIONS PRESENTED

1. Is the truth or falsity of speech relevant to whether the speech involves a matter of "public concern" under the First Amendment?

2. Are punitive damages authorized under the Federal Wiretap Act where a defendant relied in good faith upon the advice both of its own lawyers and of state prosecutors that its conduct did not violate the Act?

3. Are punitive damages authorized under the Federal Wiretap Act for defamatory use of illegally intercepted communications?

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REPLY TO BRIEF IN OPPOSITION

1. Respondents expressly conceded below, and do not deny here, that if Petitioners' speech about Respondents had been true, it surely would have involved a "matter of public concern." *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 63a. "The problem for ADL's position," said Respondents below, "is that none of [Petitioners' speech] was true." *Id.* A divided panel of the Tenth Circuit agreed, holding that Petitioners' speech did not involve a matter of public concern because it was false. The panel majority therefore denied Petitioners' speech the benefit of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), which held that speech on a matter of public concern can be sanctioned with *punitive* damages only if uttered with "actual malice." As a result, the award of punitive damages was upheld even though the jury found that Petitioners "acted negligently in publishing the statement[s]," not with actual malice. *See, e.g.*, Appendix to Brief for Respondents in Opposition ("Opp. App.") 1a. By denying public concern status, and thus First Amendment protection, to *negligently* false speech, the panel majority effectively rejected *Gertz*. For "[i]f only true statements could be matters of public concern," as Judge Hartz noted in dissent, "public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action." Pet. App. 62a; *see also Gertz*, 418 U.S. at 330 n.4 (same). The panel majority's ruling, not surprisingly, conflicts sharply with the other five circuits to have addressed this issue, all of which have been faithful to *Gertz*.

To obscure the obvious certworthiness of this important constitutional question, Respondents resort to seriously distorting the record below in two important respects. First, they falsely depict ADL as having intentionally fabricated and published known lies, readily satisfying the actual malice standard and, thus, presumably rendering pointless any remand by this Court for application of the correct constitutional standard. Second, they assert that Petitioners did not preserve the First Amendment "public concern" issue in the courts below. The record refutes both efforts. Respondents also make the legal argument that this Court has

already considered and rejected our submission that the truth or falsity of speech is irrelevant to the question whether it involves a matter of public concern. In fact, this Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), did not address public concern doctrine at all, but instead considered the very different question of when a defamation plaintiff is a limited purpose public figure.

a. Respondents open their factual presentation with the claim that the Court must accept their one-sided view of the evidence, drawing all inferences favorable to them. Opp. 2. But "in cases raising First Amendment issues, [this Court has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The Tenth Circuit conducted, as Respondents themselves acknowledge, a "*de novo* review of the entire record," Opp. 13, and its opinion, not Respondents' tendentious statement, provides the factual backdrop for the legal issue presented here.

While most of the liberties taken in Respondents' factual account are immaterial to this Court's review,[1] Respondents'

[1] Typical of Respondents' mischaracterizations of the record is their repeated statement that "none of Rosenthal's more than 20 particularized defamatory statements made reference to the Aronsons' lawsuit." Opp. 8 n.11; *see id.* at 16. At his press conference, Rosenthal introduced his comments by referring to "the lawsuit we will discuss this morning," and concluded by stating that the "suit details the allegations which I have summarized for you this morning." 10th Circuit Court of Appeals Appendix ("C.A. App.") 5178-80. And his comments during the radio interview repeatedly referred to the Aronsons' lawsuit. *See* Pet. App. 19a ("[T]he allegations that are in the lawsuit are based on words which Mr. and Mrs. Quigley have spoken."). The court of appeals had no difficulty accepting the heretofore undisputed fact that "Rosenthal was discussing allegations made in a civil lawsuit filed against the Quigleys." Pet. App. 29a.

Similarly gross is Respondents' representation that "ADL . . . brought the filing of the [Aronsons'] lawsuit . . . to the papers' attention," a claim for

(Continued on following page)

repeated assertion that Petitioners acted "maliciously," Opp. 1, demands correction. According to Respondents, ADL "concocted the notion of the Quigleys' purported 'racial discrimination/harassment,'" and "then took that fabricated accusation, devised a sham lawsuit, and attempted to use the lawsuit as 'cover' for its public relations smear campaign." Opp. 17-18.

The court of appeals, and the record, tell a very different story. A Jewish couple came to ADL with a horrific story of a concerted anti-Semitic campaign by the Quigleys to drive them from their neighborhood. Not only were the Aronsons willing to tell their story publicly and under oath, they had numerous tape-recorded conversations in which Mrs. Quigley made highly offensive anti-Semitic comments and/or "mentioned taking some type of physical action toward the Aronsons or their home." Pet. App. 13a. ADL consulted with and engaged two respected local attorneys, who researched the legality of the interceptions,[2] reviewed the tapes and other evidence, and determined that a lawsuit against the Quigleys was warranted. ADL also brought the Aronsons' allegations to the attention of the local prosecutor's office, which independently researched the legality of the tapes, requested and received copies of tapes on an on-going basis, and used the tapes in investigating and indicting the Quigleys for ethnic

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which they cite the ADL's press advisory concerning its December 7, 1994 press conference. Opp. 8 n.9. In fact, the district court found that Rosenthal was first contacted on December 6, the very day the Aronsons filed suit, by a reporter from the *Denver Post* inquiring about the lawsuit, and planned his press conference and issued the press advisory *after that initial inquiry*. *See* Pet. App. 127a-128a. Both the *Denver Post* and *Rocky Mountain News* ran their own stories about the lawsuit the morning of December 7, prior to ADL's scheduled press conference. *See* Pet. App. 63a (Hartz, J., dissenting).

[2] Respondents attempt to cast doubt on this point, *see* Opp. 7 n.7, but the undisputed evidence in the record confirms that "Lozow's initial response was to determine whether it was legal for the Aronsons to overhear and record the Quigleys' cordless telephone conversations." Pet. App. 12a. He confirmed his legal research with a local prosecutor who agreed with this conclusion. *Id.*; *see also* Pet. App. 126a-127a (district court's findings). Respondents have cited no evidence whatever to the contrary.

intimidation. *See* Pet. App. 12a-13a, 20a, 127a. ADL relied on these things in publishing the Aronsons' allegations.

To be sure, Petitioners can be faulted, and have been faulted, for not listening to the tapes themselves, and they contest neither the findings below of negligence nor the imposition of substantial *compensatory* damages. But, as the district court emphasized no fewer than three separate times, Petitioners sought "to publicize what *they believed* to be plaintiffs' anti-Semitic conduct." Pet. App. 141a (emphasis added); *see also id.* at 138a, 149a. And Respondents' hysterical charges that the ADL "concocted" the Aronsons' claims of anti-Semitic harassment out of whole cloth and orchestrated the Aronsons, their lawyers, and the local prosecutor's office in a vicious "smear campaign" for ADL's own evil "self-aggrandiz[ement]" is itself a smear campaign.[3]

However the factual question of ADL's "actual malice" might be resolved on remand, the question presented here is purely legal: is negligently false speech, as a matter of law, not entitled to the protection the First Amendment accords to speech on a matter of public concern?[4]

b. According to Respondents, "ADL never argued at trial or on appeal that the First Amendment required the Quigleys to prove 'actual malice' to support punitive damages for a defamation claim." Opp. 15 n.19. In fact, Petitioners specifically argued to the court of appeals that, "as to punitive damages under the First Amendment, this Court must

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[3] Contrary to Respondents' assertion, Opp. 17-18, the court below never suggested that ADL had itself concocted anything. Rather, it faulted ADL only because ADL "knew or should have known" that the Aronsons' allegations were unfounded – i.e., ADL was negligent. Pet. App. 33a. And, indeed, the jury *specifically found* that ADL did not "procure" the Aronsons' interceptions. *See* Opp. App. 24a-26a.

[4] Respondents' reference, *see* Opp. 22, to the jury's findings of actual malice on wholly different claims that were reversed on appeal is without merit. Because it ruled that plaintiffs need not demonstrate actual malice, the Tenth Circuit did not inquire into whether actual malice had been shown. *See* Pet. App. 33a n.7.

independently evaluate the record to determine whether the Quigleys produced clear and convincing evidence of the defendants' 'actual malice.'" Petitioners/Appellants' 10th Circuit Court of Appeals Opening Brief ("Pet. C.A. Br.") 21.[5] The panel majority rejected this argument on the sole ground that the speech at issue "did not involve matters of public concern." Pet. App. 33a & n.7; *see id.* at 55a. Respondents also represent that "ADL failed to submit a punitive damages instruction for actual malice and it received the jury instructions it did request." Opp. 21. This representation is, if not false, highly misleading. Petitioners requested jury instructions requiring findings of actual malice as an element of liability (and thus as a prerequisite to both compensatory and punitive damages). C.A. App. 398-99, 402-04, 407. The district court, however, refused to issue the requested instructions, observing, ironically enough, that "I gather that is submitted for some purpose of preserving the record that this is a matter of public concern." C.A. App. 4852.[6]

Respondents, again ignoring Petitioners' above-quoted brief to the court of appeals, question whether the Tenth Circuit's public concern inquiry even "raised a federal law issue." Opp. 14-15. But Respondents never explain how, in light of *Gertz*, the court of appeals could possibly have affirmed the award of punitive damages for defamation without finding actual malice unless it had concluded, *for purposes of the First Amendment*, that Petitioners' speech did not involve a matter of public concern. It is thus clear that the court below treated its public concern inquiry under the First Amendment (with respect to punitive damages) as coextensive with its

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[5] *See also* Petitioners/Appellants' 10th Circuit Court of Appeals Reply Brief ("Pet. C.A. Reply Br.") 12 ("If falsity alone could eliminate First Amendment protection, that would render meaningless [the *Gertz*] rule.").

[6] *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987), speaks only to an instance where the petitioner *proffered* a jury instruction only to argue in this Court that the instruction it advanced had *misstated* the law, and then compounded the waiver by failing to press that argument before the court of appeals. *See* 480 U.S. at 258-59.

public concern inquiry under Colorado law (with respect to defamation liability writ large), such that it disposed of the former in affirming the defamation award as a whole on the ground that actual malice need not be shown because Petitioners' speech did not involve a matter of public concern. *See* Pet. App. 31a-33a n.7.[7] The panel majority's citation to this Court's decisions, especially *Connick v. Myers*, 461 U.S. 138 (1983), addressing public concern in the First Amendment context, confirms as much. *See* Pet. 30a-31a.

Finally, Petitioners also squarely argued below that *Gertz* required reversal of the punitive damages awarded under the Federal Wiretap Act.[8] The panel majority expressly affirmed the Wiretap Act punitive damages on the ground "that the contents of the recorded telephone conversations were purely private matters, rather than matters of public concern. . . ." Pet. App. 55a.[9]

c. Respondents claim that *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), held that "a general subject matter . . .

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[7] *Cf. Ohio v. Robinette*, 519 U.S. 33, 37 (1996) (When a state law question appears "to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.") (internal quotation omitted).

[8] *See* Pet. C.A. Br. 54 ("Punitive damages [under the Federal Wiretap Act] cannot be imposed for the false content of speech on a matter of public concern unless the factfinder determines both falsity and actual malice. . . .") (citing *Gertz*, 418 U.S. at 350); Pet. C.A. Reply Br. 11 ("Because the jury was never called upon to find falsity and actual malice by the ADL . . . with respect to the allegations in the Aronsons' complaint, the *post hoc* award of punitive damages [under the Wiretap Act] on that basis violates the First Amendment.") (citing *Gertz*).

[9] Respondents state that the court of appeals deemed this argument waived, before "alternatively and summarily reject[ing]" it. Opp. 24. To the contrary, the Tenth Circuit merely noted that "it was unclear" whether the point had been raised in the district court, expressly assumed that it had been, and rejected it on the merits. Pet. App. 55a; *see also infra* at 10. As this Court has repeatedly held, a question is preserved if pressed and passed upon before the court of appeals. *See* Pet. 14 n.9 (citing cases).

could not be invoked to transform a private matter into a public one." Opp. 16. In fact, *Hutchinson* addressed a very distinct question, one going to liability for compensatory damages rather than to the availability of punitive damages: whether a speaker can transform a *private figure* into a public one by virtue of the defamatory speech. 443 U.S. at 133-36. *Gertz*, not *Hutchinson*, addresses the question presented here. *Gertz* specifically held that, in determining whether speech involves an issue of public concern, the trial court must "put to one side the false character of the article and treat it as though its contents were entirely true," for it "would undermine the rule of [*New York Times v. Sullivan*] to permit the actual falsity of the statement to determine whether or not its publisher is entitled to the benefit of the [actual malice] rule." 418 U.S. at 330 n.4 (quoting and adopting lower court opinion).

Respondents deny that the circuits are split on this point. Their denial, however, is premised on a mischaracterization of the question presented here. Petitioners do not advance "the proposition that a court must decide, *based entirely upon the statements in isolation*, whether they are about a matter of public concern." Opp. 18 (emphasis added). Petitioners embrace the settled rule – consistently recited in both public employment and defamation cases – that the public concern inquiry turns on the speech's "content, form, and context . . . as revealed by the whole record." *Connick*, 461 U.S. at 147-48.[10] This inquiry must focus, other circuits have held, upon the "content, form, and context" of the defamatory speech *itself*, not on the supposed falsity of the statement and the fault attributable to the speaker. *See* Pet. 18-24.

Respondents also attempt to downplay the importance of the conflict, asserting that it merely affects the stage in the analysis in which the falsity of speech is considered, but does

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[10] Respondents' contention that public concern analysis somehow differs in the public employment as opposed to the defamation context is foreclosed by *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-62 (1985) (plurality opinion), a defamation case, which cited and applied the test developed in *Connick*, a public employment case.

not affect the result of any case. Opp. 20. But if the Tenth Circuit's rule denying First Amendment protection to negligently false speech had been applied in the cited public employee cases, the employee-speakers, each of whom prevailed under the First Amendment, would have had nothing to fall back on other than factual claims that their speech was true (or not *negligently* false).[11] And if the punitive damages issue in *this case* were decided in any of the other cited circuits, it clearly would have come out differently. Respondents observe that this Court has yet to resolve the split originally identified by the Ninth Circuit "in light of three subsequent decisions [of the First, Fifth, and Sixth Circuits] that directly raise the issue," Opp. 20, but they neglect to mention that this Court's review was not sought in any of those cases. Finally, Respondents do not deny that the conflict on the question presented here persists among the state courts. *See* Pet. 20-21 n.13.

2. The decision below grossly distends the punitive damages provisions of the Federal Wiretap Act, and that issue independently warrants certiorari review.[12]

a. Respondents say that Petitioners "never claimed below that good faith reliance [on law enforcement] presented an issue of law" with respect to punitive damages under the Wiretap Act. Opp. 28. To the contrary, Petitioners argued in terms that "a defendant's good faith belief in the lawfulness of his conduct negates, *as a matter of law*, a finding of willfulness or maliciousness necessary to justify . . . punitive damages for violating the wiretap act." Pet. C.A. Br. 51 (emphasis added)

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[11] *See Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir. 1995); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 576-77 (6th Cir. 1997); *Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998); *Brasslett v. Cota*, 761 F.2d 827, 834 (1st Cir. 1985).

[12] Respondents' assertion that the "majority, if not all, of the [Aronsons'] interceptions were illegal," Opp. 5, contradicts, without any citation whatever, the district court's indisputably correct finding that "the vast majority of intercept[ions] . . . occurred prior to October 25, 1994," and thus were *perfectly legal* under the Act. Pet. App. 143a.

(citing and quoting the same passage from *Deal v. Spears*, 980 F.2d 1153, 1159 (8th Cir. 1992), quoted at Pet. 27). The court below squarely rejected this argument on its merits. *See* Pet. App. 50a-53a. The Eighth Circuit in *Deal* stated unequivocally that, "although the Spearses' reliance on the officer's statement does not absolve them of liability, it clearly demonstrates that the taping was neither wanton nor reckless" so as to permit punitive damages under the Wiretap Act. Here, it was undisputed that Petitioners likewise received assurances from law enforcement (who obtained and used the Aronsons' recordings in their own criminal investigation and prosecution throughout the relevant period), that using the intercepted conversations was indeed legal under the Wiretap Act, *see* Pet. 8, 27, yet the Tenth Circuit refused to follow the Eighth Circuit's holding that such reliance barred the imposition of punitive damages as a matter of law.

b. Respondents assert that Petitioners have not previously "argue[d] that the Federal Wiretap Statute prohibits the award of punitive damages for . . . 'defamatory use' of illegally intercepted communications." Opp. 26. But Petitioners argued to the court of appeals that "[s]electivity . . . in framing the allegations of a court pleading – the basis on which the [District] Court sustained the punitive damages award – is in no way connected to the purpose of the pertinent provisions of the federal wiretap statute," and that "impos[ing] a punitive damages award on the basis of conduct unrelated to . . . the federal statute is to improperly permit punishment of which the public is not given notice by this statute." Pet. C.A. Br. 54, 55.[13] The court of appeals mistakenly deemed this argument waived – before holding, in the alternative, that it "has no merit" – on the belief that "it was not raised in the district court." Pet. App. 56a & n.17. However, the argument (i) *was* advanced in the district court, *see* C.A. App. 1362-63 ("whether

[13] The argument appears in a section of Petitioners' Tenth Circuit brief headed "Due Process," but that hardly transforms the plainly statutory assertion quoted in the text into "wholly different constitutional challenges," as Respondents claim. Opp. 26.

the [Aronsons'] Complaint was or was not defamatory is completely irrelevant to the . . . Wiretapping Act"); *see also id.* 759, 1283-85, 1357-61, and (ii) in any case *specifically responded* to the district court's *post-judgment interjection* of a defamation rationale in affirming punitive damages under the Federal Wiretap Act. *See* Pet. 14 n.9. This question therefore is properly presented for this Court's review.

As to the merits of the question, Respondents offer a litany of speculative reasons why they think punitive damages might be justified. *See* Opp. 27-28. But none of them goes to the relevant issue: Petitioners' state of mind *specifically with respect to knowledge that they were violating the Act. See* Pet. 28-29.[14]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

February 9, 2004

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[14] Although *Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001), cited *both* an intent to injure reputation *and* the defendant's notice of illegality as grounds for affirming a punitive damage award under the Act, only the Tenth Circuit has affirmed such an award "notwithstanding a defendant's undisputed good faith with respect to its violation of the Act." Pet. 28 n.17.

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(2)

No. 03-778

IN THE

Supreme Court of the United States

SAUL F. ROSENTHAL AND THE ANTI-DEFAMATION LEAGUE,

Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE ASIAN LAW CAUCUS, BET TZEDEK, THE HUMAN RIGHTS CAMPAIGN, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NOW LEGAL DEFENSE AND EDUCATION FUND, PUBLIC COUNSEL, THE SOUTHERN POVERTY LAW CENTER, AND THE VIOLENCE POLICY CENTER IN SUPPORT OF PETITIONERS AND BRIEF AMICI CURIAE

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The American Jewish Committee, The American Jewish Congress, Americans United for Separation of Church and State, The Asian Law Caucus, Bet Tzedek, The Human Rights Campaign, The Jewish Council for Public Affairs, Lambda Legal Defense and Education Fund, The National Asian Pacific American Legal Consortium, The National Association for the Advancement of Colored People, The National Partnership for Women and Families, NOW Legal Defense and Education Fund, Public Counsel, The Southern Poverty Law Center, and The Violence Policy Center ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit. Although Petitioners the Anti-Defamation League ("ADL") and Saul F. Rosenthal have consented to the filing of this *amicus* brief, Respondents William and Dorothy Quigley have refused their consent. A copy of the proposed brief is attached.

As more fully explained at pages one through seven of the attached *amicus* brief under "Interest of Amici Curiae," *amici* have a significant interest in the outcome of this litigation because they are public interest organizations, like the ADL, that use speech about issues of public concern to advance their core missions. The rule announced by the Tenth Circuit in this case threatens to stifle the speech of these groups by imposing liability for speech traditionally afforded protection under the First Amendment.

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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INTEREST OF AMICI CURIAE

This case involves the constitutionality of a very large damage award imposed against a national civil rights organization. *Amici curiae* are also national organizations that are deeply concerned about the effects of such liability on freedom of association and freedom of speech protected by the First Amendment.[1]

The American Jewish Committee ("AJC"), a national organization of over 125,000 members and supporters with 33 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC joins in this amicus brief because, as a public interest institution, AJC is concerned that the imposition of liability on such institutions for the unratified conduct of volunteer members and that a narrow definition of what constitutes a matter of public concern will have a significant chilling effect on their activities to the detriment of our society.

The American Jewish Congress is an organization of American Jews founded in 1912 to protect the civil, political, and economic rights of American Jews. Like the ADL, it has a regional structure and relies heavily on volunteers. The issues in this case are therefore not merely of academic concern to the American Jewish Congress.

Americans United for Separation of Church and State is a national, nonsectarian public interest organization based in Washington, D.C. that is committed to preserving the

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief.

constitutional principle of separation of church and state. Since its founding in 1947, Americans United has participated as a party or amicus in numerous cases before the U.S. Supreme Court, federal courts of appeals, and state supreme courts. Americans United is comprised of more than 75,000 members nationwide and maintains an active chapter in the State of Colorado. The advocacy and legal work of Americans United is aided by numerous volunteers, including volunteer attorneys, across the country.

The Asian Law Caucus is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian-Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian-Pacific Islander civil rights legal organization. The ALC has provided legal services and community education of affirmative action and discrimination, represented individuals in discrimination suits, and conducted legal and regional policy advocacy on affirmative action.

Bet Tzedek, "The House of Justice," is a non-profit legal services agency that, since 1974, has been providing free and compassionate legal services to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds. Bet Tzedek relies heavily upon a network of volunteer attorneys, paralegals and others to serve its clients, and shares the concerns of other *amici* regarding the impact of the Court of Appeals' decision in this case.

The Human Rights Campaign ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 400,000 members and volunteers nationwide. HRC is devoted to fighting and ending discrimination on the basis

of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC provides federal and state legislative, regulatory and judicial advocacy, and media and grass roots support on a range of issues and initiatives affecting gay, lesbian and bisexual individuals.

The Jewish Council for Public Affairs (JCPA), formerly the National Jewish Community Relations Advisory Council, is an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies. Founded in 1944, JCPA is committed to the dual mission of safeguarding the rights of Jews in the United States and abroad and promoting a just society for all Americans.

Lambda Legal Defense and Education Fund is the country's oldest and largest legal organization dedicated to advancing the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS, and has often appeared before this Court. Lambda Legal's work includes litigation, policy advocacy, and public education efforts on matters of significant public concern, including harassment of minorities, religious freedom and rights of free speech.

Lambda Legal often takes positions that are initially unpopular but, over time, take root in the broader society. Lambda Legal joins this *amicus* brief because the decision below threatens the vital contributions of public interest organizations to public debate on important issues of the day and is contrary to core First Amendment principles.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan

organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Since 1994, NAPALC, with the assistance of its Affiliates, has published an annual report called the Audit of Violence Against Asian Pacific Americans. NAPALC uses community education, advocacy and technical assistance to combat hate crimes. NAPALC has an interest in the current case because its outcome has a bearing on all public interest organizations who seek pro bono legal assistance for victims of hate crimes.

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation, chartered by the State of New York, tracing its root to 1909. The NAACP has in excess of 500,000 members and over 2,200 units in the United States and overseas. As the nation's oldest and largest civil rights organization, its principal aims and objectives are clearly set forth in its Constitution as follows: To insure the political educational, social and economic equality of minority group citizens of the United States; to remove all barriers of racial discrimination through democratic processes; *to seek enactment and enforcement of federal, state and local laws securing civil rights*; to inform the public of the adverse effects of racial discrimination and to seek elimination; to educate persons as to their constitutional rights and *to take all lawful action to secure the exercise thereof, and, to take any other lawful action in furtherance of these objectives* consistent with the Articles of Incorporation.

The NAACP has used the legislature and the courts, among others, as primary instruments in its struggle to make real the rights that the Constitution provides for those within the borders of the United States.

In regard to the First Amendment right to freedom of speech and freedom of association, the NAACP has litigated significant cases in the more distant past and continues to do so in the present.

The National Partnership for Women and Families, founded in 1971, formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination and has filed numerous briefs *amicus curiae* in the federal circuit courts of appeal to advance women's opportunities.

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that has used the power of the law to define women's rights for over 30 years. NOW Legal Defense frequently appears as counsel and as amicus in federal and state courts nationwide on behalf of individuals who have experienced sex discrimination. As a public interest law firm, NOW Legal Defense frequently relies on volunteer attorneys to assist in these efforts. Accordingly, we are very concerned about the implications for our work of the Court of Appeals' decision to uphold a result that jeopardizes free expression and contravenes core First Amendment values.

Public Counsel is the nation's largest public interest pro bono law firm. Established in 1970, Public Counsel is

dedicated to advancing equal justice under law by delivering free legal services to indigent and under-represented children and adults throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and mobilizing the pro bono resources of the community's attorneys and law students. With help from over 20,000 volunteers, Public Counsel has assisted hundreds of thousands of clients and delivered over a quarter of a billion dollars worth of free legal services to the poor. Public Counsel frequently advances its goals through public advocacy on behalf of clients, both in the media and before governmental bodies. Public Counsel is concerned that holding public interest organizations liable for defamation and subjecting them to large punitive damage awards based on their advocacy, without requiring proof of actual malice, will seriously chill these organizations in the exercise of their First Amendment rights.

The Southern Poverty Law Center ("The Center"), founded in 1971, is a nationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won six landmark civil rights lawsuits before this Court.

The Violence Policy Center ("VPC") is a national nonprofit organization working to reduce firearms violence through research, education and advocacy. The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearms issues and provides

information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public. Of particular relevance to this case, the Violence Policy Center's Litigation Project initiates and participates in litigation in support of its mission. With a staff of one, the Violence Policy Center's Litigation Project, established in March 2001, relies heavily on representation by pro bono counsel. For example, the Violence Policy Center was represented by pro bono counsel in *Violence Policy Center v. Ashcroft*, No. 1:01CV01209 (D.D.C. 2001), in which the VPC was a plaintiff, and in *United States v. Thomas Lamar Bean*, 537 U.S. 71 (2003) in which the Violence Policy Center participated as *amicus*.

SUMMARY OF ARGUMENT

This case presents profoundly important questions concerning the constitutionality of a large punitive damages award against a public interest organization. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court recognized that civil judgments, like criminal prosecutions, can chill and prevent speech. The Court declared: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277.

But stifled speech is precisely what will result from the opinion of the United States Court of Appeals for the Tenth Circuit, over the dissent of Judge Hartz, which upheld a $10.5 million judgment against a national civil rights organization, the Anti-Defamation League (ADL). Supreme Court review in this case is important because this case raises several important issues, including what constitutes speech

of "public concern." The Tenth Circuit emphasized that the speech at issue was not of "public concern" in large part because it was subsequently found to be false. *Quigley v. Anti-Defamation League and Saul Rosenthal*, 327 F.3d 1044, 1059-1062 (10th Cir. 2003). The Tenth Circuit's analysis, however, confuses the issue of whether a statement is of public concern with distinct inquiries as to the identity of the parties and the truth of the statements. This Court should grant review because the Tenth Circuit's decision conflicts with prior decisions of this Court and deepens a conflict among the circuits concerning the determination of whether speech involves a matter of public concern.

The question of what constitutes a matter of public concern arises in many areas of First Amendment law under tests articulated by this Court. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (no liability for the media for broadcasting a tape of an illegally intercepted and recorded call because it involved a matter of public concern and because the media did not participate in the illegality); *Connick v. Myers*, 461 U.S. 138 (1983) (the First Amendment protects speech by government employees only if it involves a matter of public concern); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (defamation liability turning on whether a matter is of public concern). Because there are myriad circumstances in which the issue presents itself, this Court should grant certiorari to clarify a question that frequently arises in litigation and which has created great uncertainty: how are courts to determine if speech involves a matter of public concern?

Amici public interest organizations submit this brief in support of *certiorari* because of the potentially devastating effects the Tenth Circuit's decision could have if it is not overturned. If the verdict in this case is not reviewed by this

Court (and is not subsequently reversed), it will have an enormous chilling effect on the expressive activities of public advocacy groups that have historically been afforded First Amendment protection. Indeed, liability for such expression strikes at the very heart of the First Amendment.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHEN SPEECH IS OF "PUBLIC CONCERN" AND TO RESOLVE THE CONFLICTS BETWEEN THE TENTH CIRCUIT'S DECISION AND RULINGS BY THIS COURT AND OTHER CIRCUITS

A. The Speech in this Case Clearly Involved a Matter of Public Concern

The Tenth Circuit upheld the large punitive damage award returned by the jury in this case on the ground that statements regarding a federal lawsuit about bigotry, anti-Semitism, and potentially criminal conduct were not of general public concern. Although this Court has not provided a clear definition of "matters of public concern," it has indicated that this phrase refers to matters of legitimate interest to the public. *See, e.g.*, *Bartnicki*, 532 U.S. at 534 (denying liability because labor-management negotiations for schools are of interest to the public and thus a matter of public concern). In *Connick v. Myers*, 461 U.S. at 146, this Court explained that "speech touches a matter of public concern [when] . . . it can be fairly considered as relating to any matter of political, social, or other concern to the community."

The speech here certainly touched upon a matter of public importance. The statements by appellant Saul Rosenthal that were the basis for the defamation and false light liability concerned the lawsuit that the Aronsons had filed against

the Quigleys in federal court. The Wiretap Act liability arose from the speech set forth in the complaint itself. The suit alleged that the Quigleys had deprived the Aronsons of their constitutional rights based on their race and religion.

The statements that were the basis for liability related to harassment based on race and religion, a topic of obvious great social significance. As Judge Hartz powerfully observed in his dissent: "I would have thought that *the* social concern of our day is bigotry. Surely faith-based intolerance, particularly when combined with threats of violence, is a matter of concern to the community at large." *Quigley*, 327 F.3d at 1076 (emphasis in original).

Moreover, there is no doubt that comments about a pending lawsuit, particularly one regarding allegations of discrimination based on race and religion, should be deemed to be matters of public concern. As this Court has previously noted, "[t]he operation of the courts . . . [is a matter] of the utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). Furthermore, the Aronsons and Quigleys each had made reports to the local police concerning each other's conduct, and courts have found that "when police are called, a private disturbance loses much of its private nature." *Sheetz v. The Morning Call*, 946 F.2d 202, 207 (3d Cir. 1991).

B. The Panel's Narrow Definition of Matters of Public Concern Raises Important Issues and Conflicts with Prior Decisions of this Court and those of Other Circuits

The Tenth Circuit held that to be of public concern the speech at issue had to have been true or the speaker must not have been negligent in failing to discover its falsity.[2] This holding conflates very distinct questions: Is the speech true? Is the necessary mental state for liability present? Is the matter of public concern? No decision of this Court ever has held that the determination of the latter is based on, or even influenced by, the other questions.

The panel's approach is at odds with decisions of this Court holding that there are different standards for liability for defamation depending upon whether statements pertain to matters of public concern. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (articulating the importance of the inquiry as to whether speech is of public concern in defamation actions). If the panel's approach were left intact and followed, then no statement in any defamation case ever could be deemed to

2. The Tenth Circuit also held that speech cannot be a matter of public concern if it occurs between private parties. This holding also gives rise to an issue worthy of *certiorari*. No court has ever held that speech is of public concern only if it pertains to public entities or private businesses whose conduct affects the public. Quite the contrary, this Court often has ruled that speech about individuals can be of public concern. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (statements about a football coach were of public concern); *Associated Press v. Walker*, 338 U.S. 130 (1967) (statements about alleged racist activities of former army general were of public concern); *Gertz v. Welch*, 418 U.S. 323 (1974) (statements about a lawyer's conduct were of public concern).

be of "public concern" because defamatory speech, by definition, is false. Judge Hartz expressed this fundamental point well in his dissent: "If only true statements could be matters of public concern, Colorado's public concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action." *Quigley*, 327 F.3d at 1075 (emphasis in original). *See also Gertz v. Welch*, 418 U.S. at 333 n.4 ("It would undermine the rule [requiring proof of knowing or reckless falsity] to permit the factual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.")

Moreover, there is a split among the circuits concerning whether recklessly false statements can be deemed a matter of public concern. Contrary to the Tenth Circuit's approach, several circuits have held that the falsity of the statement is a distinct issue from whether it is a matter of public concern. The Fifth Circuit, for example, has declared that "the accuracy of the speech . . . [does not] play[] a role in determining whether the expression involves a matter of public concern." *Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998); *see also Victor v. McElveen*, 150 F.3d 451, 456-57 (5th Cir. 1998). The First Circuit likewise has held that "the mere fact that statements were erroneous does not remove them from the Constitution's protection. . . . To deny protections to false statements negligently made would chill discourse altogether." *Brasslett v. Cota*, 761 F.2d 827, 844 (1st Cir. 1985).

Similarly, the Second Circuit, in a case involving facts similar to this matter, found that the accuracy of the statement is a distinct issue from whether it involves a matter of public concern. *Flamm v. American Association of University Women*, 201 F.3d 144 (2d Cir. 2000), involved a suit against

a public interest organization for statements it made concerning gender discrimination. The court found that the statements involved matters of public concern even if they were false. *Id.* at 150.

The Ninth Circuit has expressly recognized the conflict among the circuits on this issue, noting that the "Circuits appear to be split on whether, in light of *Connick*, recklessly false statements are *per se* unprotected by the First Amendment." *Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir. 1995). *Compare Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998); *Brasslett v. Cota*, 761 F.2d 827, 841 (1st Cir. 1985); *Flamm v. American Association of University Women,* 201 F.3d 144 (2d Cir. 2000); *with Wulf v. City of Wichita*, 883 F.2d 842, 859 n.24 (10th Cir. 1989) ("[p]resumably, the issue of the truth or falsity of the statements at issue is relevant to both the threshold public concern analysis and the balancing required under *Pickering*. It is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern."); *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994) (cited by the Ninth Circuit in *Johnson* as creating a circuit split; noting that "even if the speech . . . involved a matter of public concern, an employee's speech is not protected where it is made with a reckless disregard for the truth").

The Tenth Circuit's opinion in this case will create a chilling effect on the manner in which public interest groups advance their causes. Many of the most critical public concerns of our day are discussed and understood primarily through the lens of the experiences of otherwise private individuals. Race, gender, and faith-based discrimination, abortion, child abuse, police misconduct, and health care, for example, are given importance in the public debate

because of their impact on the lives of individuals. Public interest groups, including *amici*, rely on people, such as the Aronsons, to come forward and make public their personal experiences. Although not every allegation advanced by an aggrieved person ultimately will be determined to be legally actionable or factually true, the underlying issues may be issues of public concern that are entitled to First Amendment protection. Speech about such events, and particularly about litigation concerning such events, is an important avenue through which public interest groups like *amici* advance their causes.

This Court should grant certiorari to resolve the important conflict among the circuits and clarify the standard for determining whether a statement involves a matter of public concern.

C. The Public Concern Doctrine and the Actual Malice Standard Insure that the Proper Balance is Struck Between Protected Speech and Liability for the Dissemination of False Information

The opinion of the Tenth Circuit replaces the actual malice standard articulated by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), for imposing punitive damages with an inquiry concerning only whether the statements were ultimately found to be false. That is, the conflating of two separate issues—the authenticity of the statement and the status of the statement as one of public concern—will result in the obliteration of the actual malice standard for determining the propriety of imposing punitive damages. Once the statement is found to be false and therefore necessarily found not to be one of public concern, punitive damages can be imposed without a finding of actual

malice. The injustice of that result is underscored in this case, where the jury returned an $8.5 million punitive damages award against a public interest organization, whose core mission includes exposing allegations of discrimination to public scrutiny, for merely disseminating information about pending litigation.

To meet the standard of actual malice, the defendant must have known that the allegedly defamatory material was false, or published it with a reckless disregard of whether it was false. *New York Times v. Sullivan*, 376 U.S. at 280; *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (1987); *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921 (2d Cir. 1987) ("A finding of malice must be based on clear and convincing evidence that 'the defendant in fact entertained serious doubts as to the truth of his publication,' or, in the alternative, know if its falsity."). The actual malice standard insures the award of punitive damages only under certain clearly defined circumstances and dissolves any concern that an individual or group might seek to take advantage of the protection afforded by the public concern doctrine. To the extent the public concern doctrine might create an opportunity either for the attack of another's character or for the dissemination of false information with impunity, the actual malice standard creates a zone of protection for the victim of a defamatory statement and simultaneously insures that the publisher of a false statement on a matter of public concern is punished for wrongdoing only if it is purposeful.

The actual malice standard thus not only punishes the author of the defamatory statement commensurate with his culpability—thereby serving as an effective tool in preventing purposeful defamation—but also preserves the special nature of punitive damages, which historically have been awarded

only in narrow and well-defined circumstances in order to punish the wrongdoer for culpable conduct. The panel opinion ignores the special nature of punitive damages, particularly in defamation cases where, as here, constitutional restraints on such damages may be present, and permits their imposition in this case without the necessary showing of actual malice.

CONCLUSION

Amici are deeply concerned about the effects large damage awards can have on their activities. The Tenth Circuit's approach to defining what constitutes matters of public concern will expose public interest organizations, such as *amici*, to a serious risk of significant liability for their speech activities in conflict with protections historically afforded these organizations by the First Amendment. For these reasons, *amici* urge this Court to grant certiorari and clarify this significant issue of First Amendment law.

Respectfully submitted,

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